

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a Corporation,
J. E. WOODS and M. J. CHAPPELL,

Plaintiffs in Error,

vs.

DAVID CLEMENT,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

Filed

JAN 9 - 1917

F. D. Monckton,
Clerk.

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Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**[1*] Names and Addresses of Attorneys of
Record.**

GEO. F. SHELTON, Esq., of Butte, Montana,

FRED J. FURMAN, Esq., of Butte, Montana.

A. E. VERHEYEN, Esq., of Butte, Montana.

Attorneys for Defendants and Plaintiffs in
Error.

BURTON K. WHEELER, Esq., of Butte, Montana,

A. A. GRORUD, Esq., of Butte, Montana,

Attorneys for Plaintiff and Defendant in
Error.

Transcript on Removal.

*In the District Court of the United States, for the
District of Montana.*

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation, CHICAGO,
MILWAUKEE & PUGET SOUND RAIL-
WAY COMPANY, (a Corporation), J. E.
WOODS and M. I. CHAPPEL,

Defendants.

BE IT REMEMBERED that on the 31st day of
March, 1913, there was filed in the above-entitled
court a Transcript on Removal from the District
Court of the Second Judicial District of the State

*Page-number appearing at top of page of original certified Transcript
of Record.

2 *Chicago, Milwaukee & St. Paul Ry. Co. et al.*
of Montana, in and for the County of Silver Bow,
which said Transcript on Removal contains an
Amended Complaint in the words and figures, fol-
lowing, to wit: [2]

*In the District Court of the Second Judicial District
of the State of Montana, in and for the County
of Silver Bow.*

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE and ST. PAUL RAIL-
WAY COMPANY, a Corporation, CHICAGO,
MILWAUKEE and PUGET SOUND RAIL-
WAY COMPANY, (a Corporation), J. E.
WOODS and M. J. CHAPPEL,

Defendants.

Amended Complaint.

Comes now the plaintiff above named and files this
his amended complaint and for cause of action
against the above-named defendant complains and
alleges:

I.

That the defendant Chicago, Milwaukee and St.
Paul Railway Company is a corporation duly or-
ganized and existing and doing business in the State
of Montana.

II.

That the defendant Chicago, Milwaukee and Puget
Sound Railway Company at all times herein men-
tioned was and now is a corporation duly organized

and existing and at all times hereinafter mentioned owned and operated a certain railway system, comprising tracks, and other appurtenances thereunto belonging, said railroad system at the time of the accident hereinafter mentioned running through and across the County of Silver Bow and the City of Butte, Montana, and particularly across that certain public street in the City of Butte known as Montana Street, said crossing being near the junction of Greenwood Street with the said Montana Street, The said Montana Street at said crossing is in a thickly populated portion of the City of Butte, and at all times many people travel upon the same all of which was known to the defendants.

[3] III.

That on the 5th day of November 1912, David Clement, Jr., was a boy of about the age of fifteen years, and a son of the plaintiff herein that on said day, J. E. Woods was an engineer in the employ of the Chicago, Milwaukee and Puget Sound Railway Company and a servant of said company, driving a steam locomotive, operated by the said company on one of its tracks at the time of the accident hereinafter mentioned; that M. J. Chappel was in the employ of the Chicago, Milwaukee and Puget Sound Railway Company as foreman of the engine crew and at the time of the accident hereinafter referred to was riding upon the engine operated by the said defendant Woods and directed the movements of the said engine at all times.

IV.

That on the morning of the 5th day of November

1912, at about the hour of four o'clock the said David Clement, Jr., was driving a pair of horses and riding in an enclosed milk-wagon, which was being drawn by said horses, going in a northerly direction, on Montana Street, a public street in the incorporated City of Butte, Montana, toward and near the intersection of the Chicago, Milwaukee and Puget Sound Railway Company's tracks and the said Montana Street (said crossing being near Greenwood Street in said city) and was not observant of the approach of a train which was running along said track in a westerly direction—the engine being under the control of the said J. E. Woods and the said M. J. Chappel and being used at the time for switching purposes in the yards of the said Chicago, Milwaukee and Puget Sound Railway Company; that the said David Clement, Jr., was coming directly within the way of the said approaching train; that the said engineer and the said Chappel did see the said David Clement, Jr., coming directly in the path [4] of the said engine, and did see that the said boy was in danger of being struck by said engine and that said boy was unobservant of the approach of the said engine; that the defendants then, after so seeng the boy in danger, negligently drove and ran said engine against the vehicle in which the said David Clement, Jr., then and there was, without giving him any warning of the approach of said train and without lowering the gates which were at the said crossing, and by reason of the negligent management and operation of said engine the said Clement boy was dragged by the same over and along the ground and

over and along the railroad track for a great distance and was drawn and dragged under the wheels of the said engine and the same was then and there run and driven over him whereby he was crushed and injured from which injuries he thereafter died.

V.

That all of the time above specified the above-mentioned Chappel and the above-mentioned Woods were acting within the course of their employment with the Chicago, Milwaukee and Puget Sound Railway Company.

VI.

That on or about the 24th day of December, 1912, the defendant Chicago, Milwaukee and Puget Sound Railway Company, a corporation, sold, transferred, set over and assigned and conveyed all of its railroad and property in the State of Montana and elsewhere to the Chicago, Milwaukee and St. Paul Railway Company, a corporation; that the Chicago, Milwaukee and St. Paul Railway Company, a Corporation, in and by the terms of the said sale and transfer of the said property aforesaid from the Chicago, Milwaukee and Puget Sound Railway Company, a Corporation, assumed all of the debts and obligations of every kind and character of the said Chicago, Milwaukee and Puget Sound Railway Company, a Corporation and entered upon the operation [5] and conduct and management of the said railroad business formerly conducted, operated and managed by the Chicago, Milwaukee and Puget Sound Railway Company.

VII.

That at the time of the accident, injury and death David Clement, Jr., was a strong and able-bodied boy of fifteen years of age, of good capacity for work, and of good disposition to work, and the plaintiff, had his son's life not been cut off by the negligent acts of the defendants here set out would have received from the boy's future earning until the boy became twenty-one years of age, five thousand (\$5,000) dollars.

WHEREFORE plaintiff demands judgment against the defendants for the sum of five thousand (\$5,000) dollars and for his costs of suit.

B. K. WHEELER,
Attorney for Plaintiff.

State of Montana,
County of Silver Bow,—ss.

David Clement, being first duly sworn, on oath deposes and says: That he is the party named as plaintiff in the above and foregoing complaint; that he has read the said complaint and knows the contents thereof and that the matters and things therein stated are true of his knowledge except those matters and things therein stated on information and belief and as to those he believes them to be true.

DAVID CLEMENT.

Subscribed and sworn to before me this —— day of February 1913.

[Notarial Seal]

B. K. WHEELER,
Notary Public for the State of Montana, Residing
at Butte, Montana.

My commission expires February 15th, 1915.

Service of the above and copy rec'd. Feb. 13-13.

GEO. F. SHELTON,
.FRED J. FURMAN,
A. J. VERHEYEN,

[6] [Endorsed]: No. 4800. In the District Court of the Second Judicial District, Silver Bow County, Montana. David Clement, Plaintiff vs. Chicago, Milwaukee & Puget Sound Railway Co., a Corporation, Defendant. Amended Complaint. Filed Feb. 13, 1913. John J. Foley, Clerk. By J. F. Driscoll, Deputy Clerk. B. K. Wheeler, Attorneys for Plaintiff.

And thereafter, to wit, on the 4th day of March, 1913, Separate Demurrer of Defendant Chicago, Milwaukee and St. Paul Railway Company, a Corporation was filed herein, which is entered of record as follows, to wit: (Continued in said Transcript on Removal.)

[7] *In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.*

No. A-4800.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE and ST. PAUL RAILWAY COMPANY, a Corporation, CHICAGO, MILWAUKEE and PUGET SOUND RAILWAY COMPANY, (a Corporation), J. E. WOODS and M. J. CHAPPEL,

Defendants.

Separate Demurrer of Defendant Chicago, Milwaukee and St. Paul Railway Company, a Corporation.

Comes now the defendant Chicago, Milwaukee and St. Paul Railway Company, a Corporation, and demurs to the amended complaint of the plaintiff on file herein; and alleges that the said amended complaint does not state facts sufficient to constitute a cause of action against the said defendant and in favor of the plaintiff.

GEO. F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Demurring Defendant.

Service of the above and foregoing Demurrer is hereby acknowledged, and copy thereof received, this 4th day of March, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

[8] [Endorsed]: Title of Court and Cause. Separate Demurrer of Defendant Chicago, Milwaukee and St. Paul Railway Company. Filed March 4, 1913. John J. Foley, Clerk. By J. F. O'Brien, Deputy Clerk. George F. Shelton, Fred J. Furman, A. J. Verheyen, Attorneys for Demurring Defendant.

And thereafter, to wit, on the 4th day of March, 1913, Separate Demurrer of Defendant M. J. Chappel, was filed herein, which is entered of record as follows, to wit: (Contained in said Transcript on Removal.)

[9] *In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.*

No. A-4800.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE and ST. PAUL RAILWAY COMPANY, a Corporation, CHICAGO, MILWAUKEE and PUGET SOUND RAILWAY COMPANY, a Corporation, J. E. WOODS and M. J. CHAPPEL,

Defendants.

Separate Demurrer of Defendant M. J. Chappel.

Comes now the above-named defendant M. J. Chappel, and demurs to the amended complaint of the plaintiff on file herein; and, as ground thereof, alleges: That said amended complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this demurring defendant.

GEO. F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Demurring Defendant.

Service of the above and foregoing Demurrer is hereby acknowledged, and copy thereof received, this 4th day of March, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

[10] [Endorsed]: Title of Court and Cause. Separate Demurrer of Defendant M. J. Chappel. Filed March 4, 1913, John J. Foley, Clerk. By J. F. O'Brien, Deputy Clerk. George F. Shelton, Fred J. Furman, A. J. Verheyen, Attorneys for Demurring Defendant.

And thereafter, to wit, on the 6th day of March, 1913, Separate Demurrer of Defendant J. E. Woods, was filed herein, which is entered of record as follows, to wit: (Contained in said Transcript on Removal.)

[11] *In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.*

No. A-4800.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation; CHICAGO, MILWAUKEE AND PUGET SOUND RAILWAY COMPANY, a Corporation; J. E. WOODS, and M. J. CHAPPEL,

Defendants.

Separate Demurrer of Defendant, J. E. Woods.

Now comes the above-named defendant, J. E. Woods, and demurs to the amended complaint of the plaintiff on file herein; and alleges that the said amended complaint does not state facts sufficient to constitute a cause of action against said defendant and in favor of the plaintiff.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Demurring Defendant.

Service of the above and foregoing Demurrer is hereby acknowledged, and copy thereof received, this 6th day of March, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

[12] [Endorsed]. Title of Court and Cause. Separate Demurrer of Defendant, J. E. Woods. Filed March 6, 1913. John J. Foley, Clerk. By D. W. Lewis, Deputy Clerk. George F. Shelton, Fred J. Furman, A. J. Verheyen, Attorneys for Demurring Defendant.

And thereafter, on the 14th day of May, 1913, order was made overruling demurrers, being as follows, to wit:

In the District Court of the United States, District of Montana.

No. 123.

DAVID CLEMENT

vs.

CHICAGO, MILWAUKEE & PUGET SOUND RY.
CO. et al.

Order Overruling Demurrers.

By consent of counsel, demurrer overruled and defendant granted 20 days to file answer.

Entered in open court May 14, 1913.

GEO. W. SPROULE,

Clerk.

Attest a true copy of minutes.

[Seal]

GEO. W. SPROULE,

Clerk.

And thereafter, to wit, on the 3d day of June, 1913, Answer to Amended Complaint was filed herein, which is entered of record as follows, to wit:

[13] *In the District Court of the United States for the District of Montana.*

No. 123.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation; CHICAGO, MILWAUKEE AND PUGET SOUND RAILWAY COMPANY, a Corporation; J. E. WOODS, and M. I. CHAPPEL,

Defendants.

Answer of Defendants to Amended Complaint.

Come now the defendants, and, for their answer to the amended complaint of the plaintiff on file herein, admit, deny, and allege:

I.

Admit the allegations contained in paragraphs numbered I, III, V, and VI, of said amended complaint.

II.

Deny the allegations contained in the last sentence of paragraph numbered II of the said amended complaint.

Admit each and every other allegation contained in said paragraph II of said amended complaint.

III.

As to the allegations contained in paragraph numbered IV of said amended complaint, defendants admit that on the morning of November 5, 1912, at about four o'clock, [14] David Clement, Jr., was driving a pair of horses attached to an enclosed milk-wagon, going in a northerly direction on Montana Street, a public thoroughfare in the City of Butte, toward and near the intersection of the defendant railway company's tracks and Montana Street; and admit that J. E. Woods was engineer of the said locomotive, and M. I. Chappel was foreman of the switching crew; and admit that no gates were lowered at that time and place; and admit that David Clement, Jr., was killed in a collision at that time and place.

Deny each and every other allegation in the said paragraph numbered IV contained.

IV.

Deny any knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered VII of said amended complaint.

V.

Deny each and every other allegation in the said amended complaint contained, not hereinbefore specifically admitted or denied.

WHEREFORE, said defendants, having fully answered, pray to be hence dismissed, with their costs in this behalf expended.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,
Attorneys for Defendants.

[15] State of Montana,
County of Silver Bow,—ss.

Fred J. Furman, being first duly sworn according to law, deposes and says: That he is one of the attorneys for the above-named defendants, and makes this affidavit of verification on behalf of said defendants for the reason that none of said defendants or the officers of said corporation defendants above named are at this time present in the County of Silver Bow, State of Montana (where affiant resides), and therefore cannot make said affidavit on behalf of said defendants, or any of them. That affiant has read the above and foregoing answer to the amended complaint, and knows the contents thereof; and that the same is true according to the best knowledge, information, and belief of affiant.

FRED J. FURMAN.

Subscribed and sworn to before me this 3d day of June, 1913.

[Seal] A. J. VERHEYEN,
Notary Public for the State of Montana, Residing at
Butte, Montana.

My Commission expires Jan. 23, 1915.

Service of the above and foregoing Answer is hereby acknowledged, and copy thereof received this 3d day of June, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

[16] [Endorsed]: No. 123. In the District Court of the United States for the District of Mon-

tana. David Clement, Plaintiff, vs. Chicago, Milwaukee and St. Paul Railway Company, a Corporation, et al., Defendants. Answer of Defendants to Amended Complaint. Filed June 3, 1913. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy.

[17] And thereafter, to wit, on the 19th day of May, 1916, Verdict was filed herein, which is entered of record as follows, to wit:

[18] *In the District Court of the United States,
District of Montana.*

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation; CHICAGO, MILWAUKEE AND PUGET SOUND RAILWAY COMPANY, a Corporation; J. E. WOODS, and M. I. CHAPPELL,

Defendants.

Verdict.

We, the jury in the above-entitled action, find our verdict in favor of the plaintiff and against the defendants and fix his damages in the sum of two thousand five hundred dollars.

A. T. MORGAN,

Foreman.

[Endorsed]: No. 123. In the District Court of the United States, District of Montana. David Clement, Plaintiff, vs. Chicago, Milwaukee and St.

Paul Railway Company, a Corporation, Defendant.
Verdict. Filed May 19, 1916. Geo. W. Sproule,
Clerk. By C. R. Garlow, Deputy. B. K. Wheeler,
Attorney for Plaintiff.

[19] And thereafter, to wit, on the 22d day of
May, 1916, Judgment was entered herein, which is
entered of record as follows, to wit:

*In the District Court of the United States, District
of Montana.*

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAIL-
WAY COMPANY, a Corporation; CHICAGO,
MILWAUKEE & PUGET SOUND RAIL-
WAY COMPANY, a Corporation, J. E.
WOODS and M. I. CHAPPEL,

Defendants.

Judgment.

BE IT REMEMBERED, that on the 17th day of
May, A. D. 1916, at the courtroom at Butte, Montana,
in the above-entitled district, the above-entitled
cause came on for hearing and trial, B. K. Wheeler
and A. A. Grorud, representing the plaintiff, and
Geo. F. Shelton, Fred J. Furman and A. J. Verheyen
representing the defendant; a jury of twelve good
and lawful men was regularly impaneled and sworn
to try the cause; evidence was introduced from sworn
witnesses on behalf of the defendant; counsel for

the respective parties argued the cause to the jury; the Court thereupon delivered to the jury its charge and instructions, and thereupon the jury retired to consider of their verdict and subsequently on the 19th day of May, A. D. 1916, returned into court with their verdict in words and figures as follows.

(After Title of Court and Cause.)

We, the jury in the above-entitled action, find our verdict in favor of the plaintiff and against the defendants, and fix his damages in the sum of two thousand five hundred dollars.

A. T. MORGAN,
Foreman.

And thereupon and by virtue of the premises, it is ORDERED, ADJUDGED and DECREED that David Clement have and recover of and from the Chicago, Milwaukee and St. Paul Railway Company, a corporation, Chicago, Milwaukee & Puget Sound Railway Company, a corporation, J E. Woods and M. I. Chappel, the sum of two thousand five hundred [20] (\$2,500) dollars, together with costs taxed at the sum of fifty-one 70/100 dollars, and also interest on both of said amounts at the rate of eight per cent per annum from date thereof until paid, and that he have execution therefor.

Judgment entered this 22d day of May, A. D. 1916.

GEO. W. SPROULE,
Clerk.

By Harry H. Walker,
Deputy.

[Endorsed]: No. 123. In the District Court of the United States, District of Montana. David Clement, Plaintiff, vs. Chicago, Milwaukee & St. Paul Railway Co., a Corporation, Chicago, Milwaukee & Puget Sound Railway Co., a Corporation, J. E. Woods and M. I. Chappel, Defendants. Judgment. Wheeler & Grorud, Attorney's for Plaintiff.

[21] And thereafter, to wit, on the 13th day of June, 1916, a Petition for a New Trial was filed herein which is entered of record as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

No. 123.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a Corpora-
tion, J. E. WOODS and M. J. CHAPPELL,
Defendants.

Petition for a New Trial.

Now come the above-named defendants and petition the Court for a new trial of said cause, for the following causes materially affecting the substantial rights of the losing parties in said cause, to wit:

1. Excessive damages appearing to have been given under the influence of passion or prejudice.

2. Insufficiency of the evidence to justify the verdict.

3. Errors in law occurring at the trial.

And, as a specification of the particular errors of law occurring at the trial and relied upon by petitioners, they offer the following, to wit:

1. The Court erred in refusing to grant the motion of the defendants for the Court to instruct the jury to find a verdict for the defendants upon the close of all the testimony in the cause.

And, as a specification of the particulars wherein the evidence is claimed to be insufficient to support [22] the verdict, petitioners set forth and aver the following, to wit:

1. In order for the plaintiff to recover in this action it was necessary for him to establish by the testimony in the case that the accident was caused by the negligence of the defendants, and that plaintiff's son, David Clement, Jr., was not guilty of concurrent negligence, which resulted in the accident and his death; and that the uncontradicted testimony in the case is that said David Clement, Jr., was guilty of concurrent negligence, which directly caused the accident and resulted in his death.

This petition will be made upon the files and records in this case and upon the minutes of the Court, including the clerk's minutes and any notes or memoranda which may have been kept by the Judge during the trial; and also upon the reporter's transcript of his shorthand notes; and also upon the bill of exceptions prepared and served, and to be here-

after settled, allowed and filed in this cause.

Dated June —, 1916.

SHELTON & FURMAN,

A. J. VERHEYEN,

Attorneys for Defendants.

[23] Service of the above and foregoing Petition for a New Trial is hereby accepted, and a copy thereof received, this — day of June, A. D. 1916.

B. K. WHEELER,

Attorneys for Plaintiff.

I hereby certify that in my opinion the within and foregoing Petition for a New Trial is well founded in point of law.

FRED J. FURMAN,

Of Counsel for Defendants

[Endorsed]: Title of Court and Cause. Petition for a New Trial. Filed June 13, 1916. Geo. W. Sproule Clerk. By Harry H. Walker, Deputy. Shelton & Furman, A. J. Verheyen, Attys. for Defs.

[24] And thereafter, to wit, on the 13th day of November, 1916, Opinion of the Court, was filed herein, which is entered of record as follows, to wit:

United States District Court, Montana.

DAVID CLEMENT,

vs.

CHICAGO-MILWAUKEE & ST. PAUL RY. CO.

Opinion.

Plaintiff's son aged one month less than 16 years, was killed by defendant's negligence in Nov., 1912,

and plaintiff sued for only his loss of the boy's earnings till 21 years of age. The jury awarded \$2500 therefor, in May, 1916, and defendants move for a new trial in that the damages are excessive.

The fother plaintiff, is a miner. The boy had lived apart from his father for indefinite years-in Wales and 7 years in a charitable home, and in May 1912, had been committed to the county industrial school as a "juvenile disorderly person" at the plaintiff's instant, for "rustling junk", plaintiff says. There he remained some six or seven weeks, returned to plaintiff, would not attend school, secured work with a milkman, worked 3 or 4 months at some undisclosed wage, gave his father \$15 from his "first" wages paid, and had drawn all his wages at the time of his death.

The law is that until a child is 21 years old the father must support and educate it, and is entitled to its services and earnings; that if before the child is 21 it is killed by another's negligence, the father is entitled to recover whatever amount it is reasonably probable the child's services and earnings would exceed the cost of its support and education. That is, the father cannot recover anything for loss of the child's society or for the father's grief, but only whatever pecuniary profit the child's death has deprived the father of. With this in mind and in the light of the evidence and common experience, the conclusion is compelled that the verdict is excessive. There is nothing to make it reasonably probable that plaintiff's boy, uneducated and [25] untrained, within 5 years of 21, who gave his father \$15, from

3 or 4 months' wages, which latter may have been \$20 to \$30 per month, would have profited his father \$2500 before the boy was 21 or anything like that. It is counter to common experience. It is highly improbable. Not one boy in 500 does it—can do it.

The determination of such cases in the nature of things must be conjectural in the main, but even the jury's conjecture must be based upon the evidence and must be reasonably probable in view of the evidence. A jury is not privileged to award any sum it sees fit, but only such sum as the evidence reasonably justifies. The evidence herein does not render it reasonably probable that had the boy lived to 21, the plaintiff could and so would have received from him a profit of \$2,500, or anything like that. thing like that.

In such cases juries are more or less unconsciously influenced by the fact of death, pain, loss of society, grief, to award excessive amounts. They overlook that pecuniary profit is all that figures in cases where a parent sues for a child's death. It is so in this case. Resolving doubts against defendants whose fault compels a determination where exactitude is impossible, the Court believes any profit plaintiff could and so would in reasonable probability have received from the boy until aged 21, to be within \$1500.

The evidence supports no more. Hence, the case will be submitted to another jury unless plaintiff renits \$1,000 of the verdict, and within 10 days. It is optional with plaintiff.

[Endorsed]: No. 123. Clement vs. Ry. Co. Memo. Filed Nov. 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy.

[26] And thereafter, to wit, on the 19th day of October, 1916, Bill of Exceptions was filed herein, which is entered of record as follows, to wit:

*In the District Court of the United States for the
District of Montana.*

No. 123.

DAVID CLEMENT,

Plaintiff.

vs.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a Corpora-
tion, J. E. WOODS and M. J. CHAPPELL,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED, that in the above-en-
titled action David Clement, plaintiff above named,
brought his suit against the Chicago, Milwaukee &
Puget Sound Railway Company, a corporation, J.
E. Woods and M. J. Chappell, to recover the sum of
\$5,000 for the loss of the earnings of his son, because
of the death of David Clement, Jr., from personal
injuries alleged to have been suffered by the said
David Clement, Jr., at the time and in the manner
specified in the complaint herein, and also in the
amended complaint herein.

Upon the issues raised by the amended complaint
(in which the Chicago, Milwaukee & St. Paul Rail-

way Company, a corporation, was joined as a party defendant to said action), and the answer of the defendants to said amended complaint, the said cause came on for trial on May 17th, 1916 before the Court and a jury of twelve persons impanelled and sworn to try the issues in said cause, B. K. Wheeler and A. A. Grorud, appearing as counsel for plaintiff, and Messrs. Shelton & Furman, and A. J. Verheyen appearing as counsel for defendants.

Whereupon the following proceedings were had and done, the rulings of the Court hereinafter set forth were made and the exceptions of the defendants thereto noted:

Testimony of David Clement, in His Own Behalf.

[27] Wednesday, May 17, 1916, one o'clock
P. M.

DAVID CLEMENT, the plaintiff, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination By Mr. WHEELER.

THE WITNESS.—My name is David Clement; I am a miner; I have lived in Butte 27 years. During that time I have been employed at the smelters and the mines; I worked in the smelters down at Meaderville, in the old-time smelter. David Clement, Jr., was my son. I remember the time he was killed, on the 5th day of November, on the morning of the 5th day of November. At that time he was coming sixteen years of age. At the time he was killed he was driving this here milk-wagon. He had been working for Mr. Glover; I could not say exactly how long he had been working for Mr. Glover; I

(Testimony of David Clement.)

guess about three months, may be a little more. He was living at the ranch when he was working. Before he went to work for Mr. Glover he was living with me, at 707 Division street, here in Butte. I am forty-seven years old.

Q. Mr. Clement, what have you to say with reference to the boy, as to whether or not he was industrious, and so forth?

Mr. FURMAN.—We object to that, on the ground it is unduly leading and suggestive; it doesn't appear necessary to lead or suggest to the witness the line of testimony desired.

The COURT.—Well, it only points attention to what counsel means by disposition. Overruled. Isn't it admitted by the answer? Well, anyway, proceed; the objection is overruled.

Mr. FURMAN.—Exception.

[28] A. Well, his ambition was all for work. The boy was working at this time, and the first payment he had—(interrupted). He was a good boy, couldn't be beaten. As to his disposition, he was all right; I never seen anything wrong with him; his disposition was good, always. He had a good feeling towards me. As to his size, he was a pretty good boy for his age, good health, strong; big boy for his age. As to what he did with his money when he went to work—the first payment he had why he fetched it home to me; I got fifteen dollars, but I don't know how much he was getting or nothing else; I never questioned him anything of that kind; I can't recollect when I got that; just one month he had

(Testimony of David Clement.)

been working at the time, I guess. He gave me that money just to help me out. While he was working at Mr. Glover's place I saw him every day. He come right to the home; right in my home. I sent him to school. As to the occasion of his quitting school,—his ambition was he wanted to work.

Q. What was the boy's—was anything said by the boy to you with reference to his going back to school?

Mr. FURMAN.—Just a minute. We object to that on the ground that is hearsay, it is irrelevant.

The COURT.—Oh, it would have a tendency to show the possible or probable amount that the boy would have contributed to the father; I am not clear whether it makes for the benefit of the *benefit of the* plaintiff or the defendant; he may answer; the objection is overruled.

Mr. FURMAN.—Exception.

A. No, he didn't want to go to school; he wanted to go to work.

[29] Cross-examination by Mr. FURMAN.

The WITNESS.—David Clement, Jr., was born in Meaderville, in 1896, the 16th of December. I live at 707 Division street here in Butte, now; I lived in Meaderville about four years after his birth. I did not come to Division street immediately after that. I roomed and boarded on East Broadway. David Clement, Jr., did not room and board with me at that time. He was back in Wales at that time, Swansea. David Clement, Jr., was seven years in the Paul Clark Home, maybe a little more. After that he was in the Industrial School. I don't know

(Testimony of David Clement.)

how long he was there, six or seven weeks, maybe a little more. He must be about fourteen when he was in the Industrial School. He lacked about a month of being sixteen at the time he was killed. I could not tell you the name of the school he went to; it is on the west side; I couldn't get him to go to school when I got him home. When he came from the Paul Clark Home he must have been close to fifteen years of age. He wouldn't go to school. He came back to my home after he left the Industrial School. He was sent to the Industrial School on account of a complaint made by me. I couldn't say how long he was kept there, I guess he must have been there about four or five weeks, may be a little more; I don't remember, exactly the time. After he came back from the Industrial School he lived with me at my house until he got this job on the milk-wagon. He spent his nights at home, every night. I did not get him the job; he rustled the job himself; I never knew how much he got for it. I did not know Mr. Glover prior to the time he went to work for him, or Mr. Glover's partner, Mr. Turner. I just met them two or three times at that time; I don't believe I would know [30] *know* them if I would see them on the street. I did not draw the pay myself; he fetched his pay to me. Mr. Turner or Mr. Glover did not pay me any money at all that had been earned by him. I did not make any demand on them.

Q. After he had worked out there for a month he paid you fifteen dollars?

A. Fetched fifteen home, sir.

His mother is dead. He worked for Mr. Glover

(Testimony of David Clement.)

and Mr. Turner close to three months; I don't know exactly how long he worked. As to what his duties were—he drove this milk-wagon; I don't know whether he had anything extra. He never told me the details of his work. He never told me what time he had to get up in the morning. I know what time in the morning he was killed; I guess it must have been about close to four o'clock, because I was coming off of shift at that time myself. I was working as a miner at that time. I am not sure whether I was getting \$3.50 at that time; it wasn't less than \$3.50. I was simply getting straight time. He was not my only child; I have a daughter back in Wales, born in this country. David Clement was my only child in this country. At the time he was killed I was living at 707 Division Street, the same place as I am now. I should judge it was about a mile from the place where David Clement was killed to the milk ranch; I don't know much about the distance. I was out there one time, when the accident happened, just a few days. David Clement, Jr., never worked for wages prior to the time he went to work for Mr. Glover. I could not say how tall a boy he was at the time of his death; I have no idea how tall he was; I can't explain how tall he was. He must have weighed close to a hundred pounds. [31] As to my having any intention of sending David Clement, Jr., to school any more—I would, but I couldn't get him to go to school. At the time he was working he called home every day; he left milk; he didn't stay there at night. Every day he came to the home and left milk. I couldn't see him every day when

(Testimony of David Clement.)

I would be day shift. During the time he worked for Glover and Turner I seen him pretty often. He was always driving his milk-wagon. He came in the house and visited with me; he did that frequently.

Redirect examination by Mr. WHEELER.

The WITNESS.—I have a daughter in Wales. The boy's mother is dead. I had the boy sent to the Industrial School on one occasion. He started to go out rustling this here hides and copper and one thing and another that I didn't wish for him to do; that was the reason, he wouldn't go to school or nothing, and that is the reason I fetched him *uo* myself. He remained there four or five weeks, may be six weeks. After that he stopped with me until he got this job.

Recross-examination by Mr. FURMAN.

Q. You made application to Judge Donlan to have the boy sent to the Industrial School?

A. Yes, I just took him up to Jerry Murphy, I believe, up to the courthouse here, at night; I mean Jerry Murphy, the chief of police now, in the city hall. He was sent from the city hall. I wouldn't like him to rustle this here copper and iron. As to his taking copper and iron that didn't belong to him—I understood he started in to rustle it; I didn't wish for him to do that.

Witness excused.

[32] Mr. WHEELER.—At this time, may it please the Court, I desire to offer in evidence the deposition of M. I. Chappell, I will say to counsel—I understand they admit that Mr. Chappell is now out of the state, in the State of Idaho.

(Testimony of David Clement.)

Mr. FURMAN.—On the statement of counsel that Mr. Chappell is without the state, and is in the State of Idaho, I will admit that that is a fact.

Mr. WHEELER.—I will say to your Honor, that this deposition was taken pursuant to a stipulation entered into on the 27th day of February, 1913. We now offer in evidence the deposition of M. I. Chappell, taken on the 27th day of February, 1913; it was signed, subscribed and sworn to on the 27th of February, 1913.

The COURT.—Very well.

Mr. WHEELER.—(Reads deposition of M. I. Chappell, taken on the 25th day of February, 1913, before Charles H. Little, Notary Public, at Butte, Montana, the witness being interrogated by B. K. Wheeler, Esq., of counsel for the plaintiff, and by Fred J. Furman, Esq., of counsel for the defendants, which said deposition, as narrated, is as follows):

Deposition of M. I. Chappell, for Plaintiff.

M. I. CHAPPEL, having been first duly sworn, testified as follows:

Direct examination by Mr. B. K. WHEELER.

The WITNESS.—My name is M. I. Chappell, I am a railroad man, train and yard service. I have been engaged in the railroad business since 1897. During that time I have been a brakeman, conductor, switchman. I have handled engines, on different occasions. At the present time I am employed by the Chicago, [33] Milwaukee & St. Paul-Puget Sound, at the time of this accident. This accident in which David Clement lost his life occurred on the morning of the

(Deposition of M. I. Chappell.)

5th of November, 1912, at 4 A. M. I had been in the employ of the Chicago, Milwaukee & Puget Sound since sometime in June; I don't remember the date exactly. I was employed as a foreman of the yard crew; personal charge of the yard engine and crew. It was at four in the morning that the engine struck David Clement. The whistle was blown about four hundred feet east of the crossing, Montana Street. Before we come to the crossing we are rounding a curve. You could not see the road from the place where the whistle was blown. At the time that the whistle was blown, 400 feet east of the crossing, I hadn't seen the wagon at all then. I was standing on the rear footboard on the engineer's side of the engine. The train was going west. The engine was backing; the cars were on the east end of the engine. I stood on the end of the engine which struck the team on which David Clement was riding. We were going about five miles an hour, at the time we struck him. We left the yards at 3:55, when I gave the signal to go. It is in the neighborhood of a fourth of a mile from the yards over to the crossing. I looked at my watch when I got on the ground and could get it out of my pocket, at the time we struck the team; it was then just four o'clock. From the starting point to the point of the accident we had been about five minutes. I first saw this team coming when I got to a point where the view was unobstructed, at a distance of about 330 or 340 feet. The team was not going very fast; they were going at a little jog of a trot. I should say they were going four miles an hour. Where this team was struck I think is the only point that the Mil-

(Deposition of M. I. Chappell.)

waukee [34] crosses Montana Street in Butte. It is the crossing by the side of the old Butte Reduction Works. I do not know whether there is a cross street there. I do not remember a fence or cars or anything that would identify it. I noticed the kind of a wagon it was from where I stood on the engine. I could see that it was a covered wagon. The person in the wagon did not stop the team at any time; never made any stop. He did not attempt to make any stop. The team never slackened, and never showed any indications that there was any line pulled on them at all. I could see the lines after I—I don't know just what the distance was that I could see the lines, but the slack wasn't taken out of them at the point where I could see them. There was never any effort on his part made to stop that I could see. There was no effort, and the team wasn't checked at any time; they continued in their same gait all the time that I seen them, until the engine struck the wagon. As to what my duties are with reference to stopping an engine or trying to stop it, when I see an object on the track,—my duty would be to signal the engineer. I was foreman of the yard crew. The foreman of the yard crew holds the same position as the conductor of a train; that is, he superintends the switching of all cars and assists also. As to my usually riding upon the engine, it depends; if I was pushing cars ahead of the engine, I would be on the point, furthest point ahead, that is, in case I was pushing cars ahead of the engine. On this evening I gave a signal to the engineer. I remember that the engineer testified at the coroner's in-

(Deposition of M. I. Chappell.)

quest. I gave the engineer one sign about 150 feet east of the crossing, may be a little more. The first signal I gave him was what is called a slow sign. I gave him another signal; I gave him the signal to stop. [35] I gave one about two car lengths, probably a hundred feet or seventy-five feet, or in that neighborhood; I can't state definitely; I don't know exactly what the distance was, somewhere in that neighborhood. The bell was ringing; I remember of hearing it about the time the whistle was blowing, shortly afterwards. The engineer of the train is obliged under the rules of the company to obey any orders that I give him, when they are considered safe in his judgment. He is supposed to obey any signal that is given to him by me or any of my helpers, under any circumstances. That is the way we work; we are regulated—we work by signals, passed from a man to the engine, either by hand or lamp. I was in charge of the engine. As to how I happened to be riding on the rear end of this engine on this morning, I always make it a point to ride on the end of the engine or cars, as I stated before,—looking out for any obstruction we might get up against, in case of any obstruction we might come up against, for protection. There is a common expression used among railroad men, in making an emergency application of air-brakes, is the “big hole.” By “sanding” an engine is meant the placing of sand on the rail, so that it will go under the wheels. By throwing an engine into the reverse is throwing it into the opposite motion to what she is in in the direction she is running. I do not think

(Deposition of M. I. Chappell.)

there was any sand upon this particular engine on that evening.

Q. Well, don't you know, Mr. Chappell, that there wasn't any sand at all upon that engine on the morning of the 5th of November, 1912?

Mr. FURMAN.—We object on the ground it is leading and suggestive and argumentative.

The COURT.—I think he may answer. The objection is overruled.

Mr. FURMAN.—Exception.

[36] A. Well, I never seen any put on her; never had seen any sand put on her, and from her performance—of the engine—I don't imagine it had any sand.

Mr. FURMAN.—We move to strike that as not responsive.

The COURT.—Yes, it is a circumstance from which an inference might be drawn. Proceed.

Mr. FURMAN.—Exception.

The WITNESS.—I could not state, from where I was upon the engine, whether or not any sand was used. I couldn't tell unless I could see it running. Unless I could see it running from the pipe to the rail; the pipe leading from the sand-box to the rail. I could tell by the action of the engine whether or not any sand was put upon the track. My opinion is that there was no sand used upon the rails on the morning of the 5th of November, 1912, just prior to and at the time of the accident.

I am one of the defendants in this action.

Q. Could the engineer see the same distance down the track that you could?

(Deposition of M. I. Chappell.)

Mr. FURMAN.—We object on the ground that that calls for a conclusion of the witness.

The COURT.—I think he can answer that question. He was in a position where he ought to know. The objection is overruled.

Mr. FURMAN.—Exception.

A. Yes, he could practically see the same distance. We were the length of the tank apart, was all. This accident occurred on the main line of the Chicago, Milwaukee & Puget Sound. A number of train had been run over that track on this night, prior to the accident, during my time on duty, commencing at seven P. M. I do not know approximately how many trains had been run over that track during that time, from the time that I went on duty until the time of the accident; I kept no [37] record of them; the regular trains had passed.

Q. What are the regular trains; how many regular trains go out?

Mr. FURMAN.—Now, we object, on the ground that there is no testimony in this case that would charge the witness with any knowledge of the number of trains, or would imply that he had any such knowledge, or would bring it under his duty to be in possession of such knowledge.

The COURT.—Well, this man is a practical railroad man. The objection is overruled.

Mr. FURMAN.—Exception.

A. There are two passenger trains, one from each direction, that are regular trains, and the freight trains are irregular, and as to the number of them

(Deposition of M. I. Chappell.)

that passed through the yards or over this piece of track that night, I can't say. The two regular trains, the one going east and the one going west, went out that night over that piece of track. There were freight trains went over that track that night.

I had twelve cars attached to the engine that night. The tonnage was approximately 700 tons, gross tonnage. I do not know the actual condition of the brakes on the cars and upon the engine; they had passed the car inspectors in the yard, and it wasn't my duty to examine them thoroughly, more than the air was cut in from the engine to and including the last car.

When I gave the first signal to the engineer to slow up I was approximately 150 feet east of the crossing. When I gave the signal to stop I was approximately 75, between 75 and a hundred feet from the crossing.

know what is known as an angle-cock on an engine. There is one on each end of the engine. One is called a stop-cock; that is the angle-cock; it [38] is on the end of the train line on a car or an engine; it is the end of the car where the hose is connected for making a coupling from between one car and the engine, or between cars; there would be a stop-cock on each end of the train line on all cars equipped with air, and also on all engines. The stop-cock would be on the back of the engine on this particular night, or of the train on which I was riding. That stop-cock was about a foot away from where I was standing. As to whether or not if that stop-cock had been open, that the train or the engine would have stopped that much quicker—

(Deposition of M. I. Chappell.)

the opening of the angle-cock on the rear of the engine, it would make an emergency application on the brakes—full power. This angle-cock was not opened on this particular evening. As to why I did not open this angle-cock—in the first place, I didn't realize it was necessary, as the engineer could work the brakes from the engine with the same effect as opening the angle-cock, until it was too late for me to reach down and open it with my hand. Before leaving the engine I tried to kick it open, and I couldn't, with my foot. As to how far away I was from the cars when I tried to kick it open with my foot—it was immediately after giving him the sign, or shortly after; I don't know just what distance after I gave him the stop sign. When I gave him the stop sign I made up my mind it was necessary to stop, and to help matters along took a kick at the angle-cock, which would have the same effect as the brake valve, but I didn't get it open, and I got off.

Throwing an engine into the reverse puts her in the opposite motion. I could not tell whether the engine was put into reverse on this particular morning, after I had given him the [39] signal to stop. I could tell under certain conditions. Putting an engine in reverse with the air, and giving the steam—working against the train, will lock the drivers, the wheels—slide them.

Q. Well, I will ask you whether or not that was done, or I will ask you whether or not you could tell whether or not that had been done on this particular

(Deposition of M. I. Chappell.)

morning—the morning of the accident, just prior to the accident?

A. Well, I didn't see the sliding and I didn't hear them. When it was thrown into reverse it would make a noise upon the track if the wheels were locked and the drivers were sliding. On this particular morning I didn't hear that at all. I think I would have heard it if it had been done. Where you use sand upon the track it has a tendency to stop the engine quicker. I am familiar with the effect that it does have from my experience in railroading.

We went four car lengths and a half past the crossing before the engine finally came to a stand still. The fifth car was on the crossing. We went four car lengths and a half and the engine and tender length. The length of the engine and the tender was probably forty feet. The cars run from 36 to 40 feet in length. We had the regulation headlight on the engine; a kerosene light. The headlight was burning when we left the yard. I did not notice it after we left the yard.

From my experience in railroading I have had occasion to see a large number of trains stopped in an emergency case, in cases of emergency. As to what distance a train can be stopped in—it depends on conditions, the braking power, the train line being charged. I do not know what the grade of the track there is; I imagine it is somewhere in the neighborhood of one-half of one per cent.

[40] . Q. I will ask you if it isn't a fact, Mr. Chappell, that going at the rate of five miles an hour, upon

(Deposition of M. I. Chappell.)

a track of the grade of the track of the Chicago, Milwaukee & Puget Sound, at the place where the accident occurred, and for a distance of 150 feet east of it—if the air had been put on and the engine had been thrown into reverse, and the track sanded, if the engine hadn't ought to have been stopped in the distance of 25 feet, taking into consideration also the tonnage that you had on this evening?

Mr. FURMAN.—We object on the ground that other material considerations are not touched in the question—no sufficient foundation laid to support an opinion of an expert; that it calls for a conclusion of the witness, and is incompetent, irrelevant and immaterial.

The COURT.—He may answer, the objection is overruled.

Mr. FURMAN.—Exception.

A. Does that include the braking power and everything in first class condition?

Q. (Question read) —and the braking power in good condition.

A. Does good condition mean first class condition or what?

Q. First class condition.

A. Well, I imagine the stop could be made somewhere in that territory, in that neighborhood, anyway, under those conditions.

Q. In what distance would you say that a train ought to be stopped—similar to the one that you were in charge of, on the morning of the 5th of November, 1912, and under exactly the conditions which pre-

(Deposition of M. I. Chappell.)

vailed there on that morning?

A. It did stop in about 150 feet. Does that mean from the point—I don't understand that question.

Q. Not asking you from any point; I am simply asking you in [41] what distance it should stop in, not what distance it did stop.

(Question read):

A. Under the conditions that prevail? Well, I don't know exactly what the conditions were. I don't know exactly in what position the engineer was.

Q. Well, I am assuming he was in the position that an engineer should be in, when he has charge of an engine?

A. That is practically the same question as was asked before.

Q. Yes, it is practically the same question. Well, you would say, would you not, that it ought to be stopped, in ordinary circumstances and conditions, that it ought to be stopped in twenty-five feet? Or would you say fifty feet?

A. Well, from 25 to 40 feet.

The engine struck the wagon just behind the front wheels. It broke the rear wheels. The engine struck the wagon, struck behind the front wheels, and the wagon was carried on the footboard and drawhead of the engine, and was slid along the rails, and was still threw when the train stopped. I saw the body of the boy after the engine stopped, the train stopped. The body was between the second and third cars from the engine; that would be three car lengths and a

(Deposition of M. I. Chappell.)

half, west from the center of the crossing; it would be about 125 feet west of the crossing. I did not examine the body thoroughly when I found it; I saw it more than once; I was alone the first time I saw it.

Q. What was the condition of the body with reference to the arms, and bruises and injuries?

Mr. FURMAN.—We object in this particular case, to testimony relating to the injuries to the body, on the ground it is irrelevant, incompetent and immaterial, in this particular case; it was competent and relevant in the other, undoubtedly.

Mr. WHEELER—Well, this is for the purpose of showing he was [42] killed and the condition that he was in.

Mr. FURMAN.—Well, it is admitted he was killed.

The COURT.—I think it might have some tendency to indicate at what speed the train was going; I think otherwise it would be harmless; it will be guided by instructions, that it isn't for the purpose of awakening the sympathies of the jury. Of course, the death is shown. So the objection will be overruled.

Mr. FURMAN.—Exception.

A. Well, the left arm was gone; the right hand was gone, and the skull looked to be crushed.

I could not tell whether there were any signs of life in the body at the time that I saw it first. I did not make an examination of it close enough to tell whether or not there was any breathing or anything

(Deposition of M. I. Chappell.)

of the kind. There was no move made by the boy after I saw him that I could see. When the train stopped, I had seen no man up to this time, but imagined there was one, under the conditions of the thing; I immediately jumped across; I got off on the south side, as soon as they got stopped I jumped across, to see what had happened in regard to the team, and so forth. As far as I know I was the first one that saw the body. It was possibly a minute after we struck the wagon, my be a little more, before I saw the body. I could not tell whether or not the boy was breathing any at that time. As to my best judgment in the matter, with reference to whether or not there was still any life in the body, I couldn't say; the body was in such a condition that I couldn't take hold of it. So I went for assistance, that is, to the engine; I went down on the left side, met the fireman, he just got down with his torch, came out off of the engine on the ground with his torch in his hand, and I asked him where the engineer was, and he told me he was on the other side, and I [43] crossed over, crawled between the cars. I did not examine the wagon to see if the side which was struck was crushed in. I don't remember how—I know there was part of the wagon left; there was part of the top of the wagon left hanging on the footboard and on the rail, supported by the drawhead. I did not see the arm of the boy or the hand of the boy before it was picked up; I don't believe that I did; I don't remember it; I think I was with the undertaker when he picked up

(Deposition of M. I. Chappell.)

the hand. That was down somewhere in the neighborhood of the body; it wasn't far away. I could not tell whether the body had been dragged along the ground.

Q. How far was the boy away from the crossing when you first saw him, or how far was the team away from the crossing when you first saw it?

A. Well, it came in sight about the same time that—the team came in sight about the same time that the engine rounded the curve at a point where the view was unobstructed from building, and so forth. I should judge that was about 175 feet from the crossing, somewhere in that neighborhood. I didn't measure the ground; I can't answer accurately.

Q. And you say that from the time that you first saw him he never made any attempt to stop, but left the horses jog along at about four miles an hour?

A. Something like that; there was no effort on the part of the driver, if there was one, that I could see; in fact I didn't know there was one. I could not tell whether there was or not. As to other noises from the engine other than the ones that I have specified,—there was an exhaust from the pump, from the pump of the engine, that makes considerable noise at all times when it is working. The whistle was never blown from the time it was blown about 400 feet east of the crossing, that I knew of. That was the regulation crossing [44] whistle, consisting of one long and two short blasts.

I made a statement to Mr. Webb. That was a

(Deposition of M. I. Chappell.)

few days after the accident occurred. It was a signed statement by me. It was made for the claim department; I don't know what they do with them; I suppose it was made for the claim department, Mr. Webb, as I understand, represents the claim department.

This wagon was what you would call a spring wagon, if I remember right, when I was on the farm; that is what they called them, covered over from front to rear, painted white, with glass on the side extending back probably, oh, I couldn't say exactly; it looked to be about three feet.

Q. Could you tell whether or not any effort was made on the part of the engineer, after you gave him the signal to slow, to slow up, to slow the engine?

A. Why, I don't know; I couldn't answer for what he did. He wasn't working steam, and the train was slowing up. I couldn't tell exactly—I was watching the team. He might have made a slight application of air.

Q. You could tell whether or not, after you gave him the signal to stop, could you not, whether or not he threw the engine into reverse?

A. Yes, I believe I could.

Q. And I will ask you whether or not he did throw it into reverse after you gave him the signal to stop.

A. I don't know; I didn't see him throw it over.

Q. But you do know that the engine didn't slide along on the track as it ordinarily does when it is thrown in reverse?

A. I didn't see any indication to show that the

(Deposition of M. I. Chappell.)

engine was thrown in the opposite motion at any time.

[45] Cross-examination by Mr. FURMAN.

The WITNESS.—I have never been employed as an engineer. On this night in question I was in charge of the train; that includes the engine and crew. At the time of the accident I could not see, relative to the engineer and his actions.

Redirect Examination by Mr. WHEELER.

The WITNESS.—I could not see whether or not the engineer got my signals that I gave him. He might have been dead, for all I know. An engineer's position is on the right side, with his head out to the cab window, looking for signals or obstructions at all times. As to the signals I gave him,—a slow sign is a hand or lamp held out in sight, horizontally. And a stop sign is a lamp swung across the track, or swung in this manner, (Indicating.) I was on the south side of the engine, south corner of the footboard; south end of the footboard it would be, when I gave him the signal to stop. That would be on the same side that the engineer is ordinarily on when he is running his engine; he couldn't run it from the other side.

[Endorsed]: Filed May 17, 1916.

Testimony of James B. Glover, for Plaintiff.

[46] JAMES B. GLOVER, a witness called on behalf of the plaintiff having been first duly sworn, testified as follows:

Direct Examination by Mr. WHEELER.

The WITNESS.—My name is James B. Glover.

(Testimony of James B. Glover.)

I am timekeeper at the Modoc mine at present; I am working for the Anaconda Copper Mining Company; I have been working for them a little over two years. Before that I was in the garage business. Prior to that I was in the milk business. I knew David Clement, Jr. I knew him during the course of his time with me, probably four months, that is, prior to the accident. He was my helper on the wagon. I think the boy was in the neighborhood of 16 years old. He was probably five feet five or six, somewhere around there. As to his capacity for work—I never found him what you would say shirk his work; he was willing to do his work. I considered him a good boy. He was working for me the day of the accident. His habits were very regular; I do not know of him dissipating; I don't believe I ever saw the boy smoke a cigarette; if he did it wasn't in my presence; and his language was always proper or I wouldn't have kept him in my employ. He was a very dependable boy. As far as his strength, he seemed to me to be—well, I imagine the boy to be about 17 or 18, well, 17 years old; I didn't think he was 15 when I hired him; he had the build of a boy about 17, I imagine he weighed about 120 or 135 pounds, somewhere around there, just guessing at it in comparison with my own weight. He drove the milk-wagon for me, he assisted. The wagon was an enclosed one. It was what we call a covered wagon, on springs, it had panes in front, and panes on the side, and also panes in the door; the door you might say was like this (indicating), and the seat [47] was just about

(Testimony of James B. Glover.)

where I am sitting here in reference to the door over there; and the door was a sliding door, and in front we had milk cans, and also in the rear and also under the seat; in this particular case he had a big load; he had milk stuck on his seat, so that it was just one narrow seat. When I took the wagon one of us would sit on the milk cans. There was just one seat, milk under the seat, milk on the side of the seat, probably five or ten gallon cans or may be three gallon cans, just depended on what the trade called for; and the front we usually carried the bottles underneath and the cans on top. The wagon was a brand new wagon; it had just a few months service. I saw the condition of the wagon after the accident.

Q. How long after the accident was it before you were there?

Mr. FURMAN.—We object on the ground it is incompetent, irrelevant and immaterial; doesn't tend to prove any issue raised by the pleadings.

Mr. WHEELER.—I intend to show the distance—

The COURT.—I think he may answer as to the condition of things; it might be evidence from which the jury can infer the force of the blow; it might have some bearing on the question of whether the engineer did all that was reasonable to stop. The objection is overruled.

Mr. FURMAN.—Exception.

A. Less than an hour.

The wagon was demonished entirely; there was one wheel that was intact, outside of that it was a

(Testimony of James B. Glover.)

complete wreck. I made measurements down there. I was down there in less than an hour after the accident occurred. I am very familiar with the situation down there, because I was interested. The Milwaukee [48] crosses Montana Street, where this accident took place, just this side of the cemeteries, just northeast of the cemeteries a few feet off the corner of one of the cemeteries. There are some houses along Montana Street, some little distance south of the tracks. The first house, I measured it, or I might not remember it. I think that is my diagram that you have in your hand. I made you a diagram when I measured it. I made that diagram shortly after the accident; I don't remember what date; I was getting information for my own benefit. I showed on that diagram the distance from the first house south of the railroad track. I have got the distance here 176 feet. The railroad track comes around a kind of a curve.

Q. And did you have occasion to observe whereabouts, coming around that curve, whereabouts a person could first see an object upon Montana Street?

A. Yes, I had a man with me when we measured, and we went to this house, which was running parallel, east and west, and I got on the corner of the house and looked right direct to this railroad track, and had this party go along the track, and then I had him stand there, so that I wouldn't lose my vision, and we measured that distance, and from the house to there it was a distance, according to these figures,—whether that is accurate or not, I don't

(Testimony of James B. Glover.)

know—of 325 feet; that is where the accident was from the corner of the house; we measured from this same point where he could have seen the boy or seen the crossing where the boy crossed, was a distance of 347 feet, according to these figures here. I will take that back, he could have seen him for a distance of 600 feet. I made measurements as to how far the milk-wagon was taken past the crossing. I do not remember that now. There is a figure on this diagram of 241 feet. I think it was 241 feet to the switch, and six feet I [49] think was carried beyond the switch; I won't say positive that is right, now. That is my recollection. I made that measurement just a few days after the accident. I know the point where the boy was picked up; I think it is about midway between what is known as the switch and the track. This sketch, for a rough sketch, I should say was nearly accurate, showing the situation as it is down there at the place where the boy was killed, showing the crossing at Montana Street, and so forth. I have indicated on this diagram north, south, east and west, and also Montana Street.

Mr. WHEELER.—Now, we offer this diagram in evidence.

Examination by Mr. FURMAN.

The WITNESS.—I think I made this; I am almost sure I did; it is so long, but it seems familiar to me; I know I made one, and I think that is the one. As to my independent recollection of the facts,—there is one distance I think I am almost sure of,

(Testimony of James B. Glover.)

that is the distance from the switch—the distance the wagon was carried. The figures are not in my handwriting, but the diagram was drawn in my handwriting. I think I made a note of these; I think I gave them to somebody and they wrote them down, took them from my notes, after I drew this diagram; I think that is the way it was. I made the notes, and this diagram, I drew, I think it was in an office some place, if I remember right; I took my notes and these were placed on by somebody, I don't remember who. I do not remember the occasion for it being lettered, but I remember of drawing this diagram; I don't remember the date I drew it, to tell the truth about it, but I know it is mine. I do not remember when the figures were put on, but it seems to me they were put on at the place I used this as an example or exhibit or sample.

[50] Examination by Mr. WHEELER.

The WITNESS.—I imagine the way it happened is that I drew that in Mr. Grorud's presence up at the office or had it up there explaining it, and he wrote those figures in my presence; but at this time I don't remember of the incident.

Mr. FURMAN.—If Mr. Grorud says here in court that was what happened, I withdraw my objection.

Mr. WHEELER.—I understand he helped make it.

Mr. FURMAN.—Is that the fact, Mr. Grorud?

Mr. GRORUD.—That is the fact.

(Diagram received in evidence, and marked Plaintiff's Exhibit "A.")

(Testimony of James B. Glover.)

Cross-examination by Mr. FURMAN.

The WITNESS.—I brought a suit against the Milwaukee for the destruction of the wagon and the injuries to the team. I was nonsuited in that case. I lost the suit. I did not know David Clement, Jr. before he went to work for me. I first got acquainted with him at the ranch.

Q. Was that the first information that you had respecting him?

Mr. WHEELER.—We object to it as being irrelevant and immaterial, and incompetent, not tending to prove or disprove any issue. He says he first met him at the ranch.

The COURT.—I think so. Objection sustained.

Mr. FURMAN.—Exception.

The WITNESS.—I have a brother-in-law in this community, by the name of Congdon; that is the only brother-in-law I have.

Mr. FURMAN.—I would like to make an offer of proof.

[51] (Whereupon the following offer in writing was submitted:)

“Defendant offers to prove by plaintiff’s witness, Glover, now on the stand, that he first heard of David Clement, Junior, when the said Clement was sleeping in a barn belonging to witness’ brother-in-law, Al Congdon. That the said time was shortly prior to the time Clement, Jr., started working for witness.”

Mr. WHEELER.—We object to the offer on the ground it is incompetent, irrelevant and immaterial,

(Testimony of James B. Glover.)

improper cross-examination, not proving or tending to prove any issue in the case.

The COURT.—Objection sustained.

Mr. FURMAN.—Exception.

The WITNESS.—As to the duties of David Clement, Jr., at the time of the accident—he would bring the team in mornings to my home, residence in town, and from there we would deliver milk together. I would always meet him there or meet him between there and the ranch. The ranch is located about a half a mile west of the cemeteries. I imagine it is about a mile or a mile and a quarter from the place of the accident. We had in the neighborhood of five or six customers between the ranch and the place of the accident, that David Clement had left milk with this morning. The seat he sat in was right on the side, right on the end; it was a seat that had a back to it, with a little iron railing; it was just a narrow seat for one man to sit in comfortably; there was a back that you could swing forward or backward. The wagon was entirely enclosed, either with glass or wood.

Q. Now, what have you to say with relation to the manner in which David Clement, Jr., drew his pay, and with relation to whether he permitted his money to accumulate with you or kept it drawn up?

[52] A. Well, now, I don't remember; I believe he has drawn two or three times to get clothes, or something like that, but I don't remember, it is so far back for me to say. I do not think he had any wages coming at the time of his death; I think it

(Testimony of James B. Glover.)

was just shortly after pay-day, or something like that; we used to pay I think twice a month. He never had anything coming but what he got; we always squared all of our help.

Redirect Examination by Mr. WHEELER.

The WITNESS.—At the time of the accident the road south of the crossing there at Montana Street, that he had to go along on and up Montana Street, was in a very bad condition. The street-car company had just excavated for a track, and they hadn't filled in at the time; some of the rails were laid and some were not; it was excavated clean around to the last turn before you come to the ranch; they were waiting for rails or ties, I don't know which, and it laid that way for some time.

I know Mr. Bullwinkle, the claim agent for the Chicago, Milwaukee & St. Paul Railway Company. I have had a conversation with him recently. I had a conversation with him last night.

Q. And what, if anything, was said by Mr. Bullwinkle, at that time, with reference to settling that case of yours?

Mr. FURMAN.—We object to that, on the ground it is incompetent, irrelevant and immaterial; doesn't tend to prove any issue raised by the pleadings, and it is improper redirect examination.

The COURT.—What purpose do you think it will serve?

Mr. WHEELER.—Well, I think, may it please the Court, it is competent, if Mr. Bullwinkle went to

(Testimony of James B. Glover.)

this witness and offered to settle a case just immediately prior to the time—settle the case which he had lost.

[53] The COURT.—I think he may answer. You brought out this witness had some controversy, and the purpose was, of course, to show his interest or bias or prejudice. Now, this may tend to relieve the inference, if any such would be drawn. The objection is overruled.

Mr. FURMAN.—Exception.

Q. (Question read.) I mean what, if anything, was said by Mr. Bullwinkle, on last evening, to you, with reference to settling the case which you had previously lost.

A. I told Mr. Bullwinkle that I expected to start a new case, I think I did, and that I thought I had room for another case against them; and I think he told me if I hadn't been hasty they would have probably come to some settlement with me.

Q. Well, what, if anything, was said with reference to his settling with you at this time, or after this suit, this case, here, was over?

A. Why, he told me that they probably would be able to settle with me, or make some kind of a settlement.

Witness excused.

[54] Testimony of William Willoughby, for Plaintiff.

WILLIAM WILLOUGHBY, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. WHEELER.

The WITNESS.—My name is William Willoughby. I am a miner. I have been engaged in mining about thirty-five years. During that time I have been chiefly here in Butte. I am not working at the present time. I have just come back from Galen; I have been down there taking treatment for miners' consumption. On the morning of the 5th of November, 1912, I was over on Montana Street, I guess. I was going home. It was about four, I guess, in the morning, may be ten to four, just around four o'clock. I know where the Milwaukee track crosses Montana Street. I was about 150 feet away from there. I did not notice anything but the wagon coming down and the train collide. The engine was backing down. I couldn't tell how many cars were attached to it, one or two, may be ten; may be ten or twelve, I don't know. A fellow name of Chappell was on the back end of that car; I just slightly acquainted with him; I knew the man. I was acquainted with him at that time; I was living close to him, the second house from him. I do not know how fast the train was going on that morning; it was going a kind of a slow speed; of course, it was a switch-engine, may be six or seven miles an hour.

(Testimony of William Willoughby.)

The team was going just a little dog trot, you know, just jogging along.

Q. And what have you to say with reference to whether or not you saw anything done unusual by the man on the train, on the back end of the engine; what if anything was done by him?

A. Oh, I didn't see anything more than I see him signal, of some kind; I don't know; I am no railroad man myself. He had a [55] lantern; of course, I don't understand signals. I heard the train whistle up at the switch up there, right, it must have been around there by the switch. At that time it must have been a quarter of a mile, very near, from the railroad crossing; it was up around the turn there. I saw the engine strike the wagon. It just crushed it right in, just like anything else, over-powered, of course, and squeezed right to pieces. It slid on the rails possibly 150 feet, that is giving a rough estimate. I helped to take the boy out after the accident, with the undertaker.

Q. How far would you say that you took him up, with the undertaker, from the crossing?

Mr. FURMAN.—We object on the ground it is irrelevant, incompetent, and immaterial; doesn't tend to prove any issue raised in the case.

The COURT.—I think he may answer. Overruled.

Mr. FURMAN.—Exception.

Q. How far from the crossing would you say that he was—from the middle of Montana Street?

A. Oh, possibly 75 or 100 feet, I don't know just how—possibly 75 feet.

(Testimony of William Willoughby.)

Cross-examination by Mr. FURMAN.

The WITNESS.—I have never done any railroad-ing myself. I saw Mr. Chappell with a lantern in his hand; I could tell the light of the lantern. I do not know what signal he gave; I am not in the habit of knowing that—railroad signals. I just saw him, he flung his lantern, and, of course, he hopped off the back end of the engine to avoid the accident himself. I could see him jump off. That was when the lantern flashed around. I [56] knew Chappell at that time; I lived alongside of the man. At that time I suppose I was about 100 feet away; of course, I couldn't tell only by the arclight. I knew it was Chappell. I knew it was Chappell when he jumped off. The arclight was right over the crossing; he was pretty close to it when he got off. I just knew David Clement, Jr., at that time by sight, passing along the road there. I saw the wagon, of course, but I didn't see him on the inside; of course, you couldn't very well see him that way. He left milk at a sister-in-law of mine there, right directly opposite the Mount Moriah Cemetery gate. The team was going just a little slow dog trot; the train going one way, and the team, both kept going until they met.

Redirect Examination by Mr. WHEELER.

The WITNESS.—The arclight is on the south side of the crossing, possibly fifty feet away from the crossing. The rays of that arclight extend close to a block, I guess; you can see for a block away.

Witness excused.

[57] Testimony of M. J. McMasters, for Plaintiff.

M. J. McMASTERS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. WHEELER.

The WITNESS.—My name is M. J. McMasters. I am a switchman. I am working for the Northern Pacific at the present time. I have worked two times for them, about two years each time. On the 5th of November, 1912, I was working for the Milwaukee railroad. I was working on this train that collided with the milk-wagon and boy. The collision took place about four o'clock. I was on the rear car, I know where that curve is just before you get to Montana Street. I should say on that morning we were going six to eight miles an hour. As to what there was that was near me on the rear end of that car—the brake was there, and the retainer valve. The retainer valve is where the air escapes out after you release the air. It makes that retainer valve—it will blow to a certain extent. When he releases the brakes this retainer valve will blow at the end of the car. I have been railroading about ten years. I have had some experience and observed in what distance a train can be stopped. We had about 700 tons on that train that morning. They were boxcars and gondolas, mixed cars. I judge the grade there, around that curve, is about one-half of one per cent. I have ridden on trains when emergency stops were made. As to the effect on

(Testimony of M. J. McMasters.)

a person riding upon a freight train when an emergency stop is had—you can hear the brakes go on, and the jar of the train at the rear end. I did not see this accident. I should judge the emergency brakes were put on that morning about at the crossing; the engine was about at the crossing when they were put on. I could tell that [58] from the distance I went; from the distance it was. After we struck the crossing we went past about—I don't just remember, but it must have been four or five car lengths by the crossing.

Cross-examination by Mr. FURMAN.

The WITNESS.—I do not know just exactly the date I left the employment of the Milwaukee, about a month afterwards, I think. I quit. I have never run an engine myself. I never did any engine work; just switch cars is all. I was sitting on the last car near the brake, where the brake was on the end of the car. My feet were hanging over one side. I was facing south. I could not see what was ahead. I suppose the train was about 500 feet long, the twelve cars and the engine and tender; the cars were 40 and 36 feet apiece.

Witness excused.

[59] **Testimony of L. S. Groff, for Plaintiff.**

L. S. GROFF, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. WHEELER.

The WITNESS.—My name is L. S. Groff; I am a

(Testimony of L. S. Groff.)

deputy United States Marshal; I have been such since about the 11th of May, a year ago. Previous to that I was a railroad man. I had been engaged in the railroad business prior to that time about 12 years. I worked for the Northern Pacific, the Great Northern, the Milwaukee, the Denver & Rio Grande. The last shift I worked for the Milwaukee was the 23d day of December, 1914, night. Prior to that I had been working for the Milwaukee. I am familiar with switch-engine known as 1163; I worked with it. I worked as switchman, a switch foreman, and also as a night yardmaster. During my experience in railroading I have had occasion to observe in what space an engine can be stopped, and trains can be stopped in emergency situations. I know where the Montana Street crossing is in the City of Butte, on the Milwaukee. I am familiar with the grade over that crossing. The grade is about one-half of one per cent, I should judge.

Q. I will ask you, Mr. Groff, from your experience as a railroad man, in what distance you could stop an engine backing, and drawing twelve cars, carrying a tonnage of about 700 tons, over a grade of one-half of one per cent, and going at the rate of six or eight miles an hour—what distance could you stop that engine, by applying all the emergency applications?

A. Well, if the conditions were favorable, everything in first-class shape, you had ought to stop it in about fifteen feet; I should say fifteen feet. I have a fair idea of the [60] grade just east of

(Testimony of L. S. Groff.)

that crossing. The grade is about the same, I should think.

Q. Now, Mr. Groff, I will ask you, if a person is riding upon a freight train, and an emergency application is put on to the engine to stop that train, what if anything would it do to a person standing or riding upon the engine?

A. Well, if you were sitting in the position that I am in, with nothing behind you, it would knock you down; if you were standing up, the chances are it would knock you over on the floor.

Cross-examination by Mr. FURMAN.

The WITNESS.—I have been a deputy United States marshal since about May 11th, 1915. I cannot say I am very frequently associated with Mr. Wheeler, United States District Attorney. In a way I see the man, but otherwise, I am not. As to my being very friendly with Mr. Wheeler, he never done me no harm. Our relations are friendly as far as I know; he has never done me no harm.

The last shift I worked for the Milwaukee was the 23d day of December, 1914. I left the Milwaukee of my own volition. I never was notified that I was discharged.

Q. As a matter of fact you had a lawsuit of your own against the Milwaukee, for an alleged personal injury, and Mr. B. K. Wheeler was your attorney?

A. I never come to a lawsuit; it was settled out of court altogether. I claimed a certain amount of

(Testimony of James A. Brittian.)

money that was due me, and I got it. Mr. Wheeler was my attorney in that matter.

Witness excused.

[61] Testimony of James A. Brittian, for Plaintiff.

JAMES A. BRITTIAN, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. WHEELER.

The WITNESS.—My name is James A. Brittian. As to my business—I am not doing anything now. Most of my life I have followed railroading. I have been engaged as a locomotive fireman and engineer. I am familiar with the Milwaukee Engine No. 1163. I have driven that engine. I worked for the Milwaukee a little over three years. I was at that time familiar with the location of the Montana Street crossing on the Milwaukee; there has been buildings put up around there since I quit for the Milwaukee, and there may be some changes there now; at the time I run this engine for about a year. I am familiar with the grade. That grade is in the neighborhood of one-half of one per cent, I should judge, one-half or three-quarters. I was an engineer for sixteen years.

Q. I will ask you, Mr. Brittian, in what distance you could stop an engine, drawing twelve cars, composed of gondolas and boxcars, with a tonnage of 700 tons, going at the rate of six miles an hour, around a curve and across the Montana Street crossing, with the Milwaukee engine No. 1163?

(Testimony of James A. Brittian.)

A. Well, it is kind of hard to tell that exactly; it depends altogether—it doesn't depend altogether on the brakes of the engine; it depends on the condition of the braking power on those cars. Assuming that the braking power is in good condition and that the air is connected up, they ought to be stopped, with an emergency stop, in I should think twenty or twenty-five feet at least.

[62] Cross-examination by Mr. FURMAN.

The WITNESS.—As to when I quit the service of the Milwaukee, the last trip I made was on the 17th day of March three years ago. The occasion of my quitting was handling 16 roughly, in coupling onto 16 at Piedmont, with a Maley engine. I was discharged for that. I have not worked for the Milwaukee since. I have not worked for any other railroad since. I believe I am thoroughly familiar with braking apparatus. The condition of the rail has something to do with an emergency stop. Any rail that the wheel is liable to slide on, it is harder to stop on; you don't get any power at all braking, with the wheel sliding. If you can get sand on the rail, it is almost impossible to slide the wheels. If I were to make an emergency application I do not believe I would reverse the engine. I would not slide the wheels if I could avoid it; probably a person would get excited though, under the condition, that he might reverse the engine, but ordinarily I don't believe I would. It would not add to the braking power but very little, if any, to reverse the engine. If there had been a light service application to check

(Testimony of James A. Brittian.))

the speed of your train a short distance back, and a short time before you made your emergency application, you would be able to get an emergency application under those conditions. You wouldn't get as good an application right after having released your brake as you would by having your train line fully charged, but you could make a slight application previous to that and then your emergency immediately after. That would probably affect somewhat the distance in which the emergency stop could be made.

Q. Now, isn't it fact that in case there had been an application there to check the speed of the train, and then a short [63] while afterwards it became necessary to stop the train, and an attempt was made to put on an emergency application of air, isn't it a fact that the thing you would really get would be a full service application and not an emergency application?

A. Well, you wouldn't get any results at all hardly from a service application, after having had the application just previous; the only service you would get would be the emergency.

Q. But that would work out so that the emergency application itself would be no more than a service application?

A. No, I don't think so. It might not start quite so soon, but that is the only way you would get any result would be your emergency application. The fact of the service application would change my opinion about the distance in which the train could

(Testimony of James A. Brittian.)

be stopped. Under those conditions it would be as perfect braking conditions as you could get, but you wouldn't get what you would get if you hadn't made the previous application.

Witness excused.

Mr. WHEELER.—We rest. That is our case, your Honor.

The COURT.—Proceed for the defense.

Testimony of J. E. Woods, for Defendants.

[64] J. E. WOODS, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. FURMAN.

The WITNESS.—My name is J. E. Woods. I am in the employ of the Milwaukee railroad. I have been in their employ since May, 1912. I have worked for the Milwaukee railroad as a boiler maker, helper and engine despatcher, before I was hired as an engineer. Prior to my working for the Milwaukee I had from 1906 the position as engine wiper, fireman, engineer, for the B. A. & P. Railway. I was born in Missoula, Montana. My home is at Deer Lodge at the present time. I was engineer for the Milwaukee on the morning of the 5th day of November, 1912. I was working in the Milwaukee yard, in south Butte, that morning. I had engine 1163. It is what we term a switch-engine, with foot-boards on each end, and a kerosene headlight on each end. For practical purposes it didn't make a bit of difference whether the engine was going ahead or backwards. That morning the engine was

(Testimony of J. E. Woods.)

headed east, we were backing west. We were pulling a train behind. There is no difference in the appearance of the two ends of the engine, only the rear end has what they call a sloping tender on it; you can sit up in the cab and look right over the back of that tender. I have been in the courtroom during the progress of this trial. I have heard the testimony relating to the collision with the milk-wagon in which David Clement, Jr., was riding. I was the man running that engine that morning. I was sitting on what we call the right-hand side or the south side of the engine; I was facing the front of the engine. The train consisted, I believe, of coal and coke, of twelve cars. The total gross weight of the [65] train was 700 or 750 tons, I should judge. The train was made up in the yard, about a quarter of a mile east of there. We were to transfer this stuff to the B. A. & P.

Q. What if any signals did you give approaching this crossing; first with reference to the whistle?

A. Well, I sounded the whistle, one long and two shorts, I should judge about 300 or 400 feet from this crossing. One long and two short is the regular signal of alarm according to the Milwaukee code of rules. That signal is to warn people when you are approaching the crossing. It is the regular crossing whistle of the Milwaukee. That is the whistle I gave, one long and two short. The bell was ringing. I had a fireman by the name of Byers; I think he is dead at the present time. It was a clear, frosty morning. The accident happened about four o'clock.

(Testimony of J. E. Woods.)

Q. Did the engine, as it approached the crossing, make any other noise besides the noise of the whistle, bell, or the rattle of the iron on the rails?

A. Yes, we had what we term a blower on the engine, that is, a force draft on the fire-box; the engine wasn't steaming very good, and was leaking, and we had this force draft on the fire because it is a hard pull to get to the B. A. & P. transfer with this many loads with that engine. That makes quite a noise. On a morning like that I should judge it could be heard a quarter of a mile.

Q. Now, then, will you just describe the Milwaukee track, in its general appearance, for the distance of a few hundred feet east of the crossing on Montana Street in south Butte?

A. Why, it comes around a curve. When I got within about 150 feet or 200 feet of the crossing I see a team driving up there along the road. The team was approaching at a pretty [66] fair trot, I should judge the team was going five miles an hour. It was a covered wagon. I did not see any driver then. I first saw the occupant of the wagon after we stopped and I got off of the engine and went back and met Mr. Chappell, and we went back to where the boy was laying between the cars; that is the first time that I saw anybody.

Q. Now, then, will you tell us what if any applications you made of air, or what manipulations you made of the braking apparatus that morning, prior to your stop after the accident?

A. Why, I had just made a seven or ten pound

(Testimony of J. E. Woods.)

brake power reduction to take this slack up to take this curve. Prior to this reduction we were going eight miles an hour, anyway. We slowed to six miles an hour, about six miles an hour, I should judge.

Q. And what further application of air did you make?

A. Why, I didn't—I released this and didn't make no more applications of air until I see the team wasn't going to stop, and then I used the emergency, about 75 feet from the crossing.

Q. When you first observed at this point, 75 feet from the crossing, that the team showed no signs of stopping, now tell the jury everything that you did?

A. Well, I done everything in my power to stop the engine; that is, I throwed the air in the emergency; that is all that I could do. At that time the bell was ringing; the bell was ringing at the time of the collision. I observed the rails after the accident; when I got off the engine I noticed they were frosty. I did not use sand that morning; it was on a curve; there was no use using sand, on account of the pipes are bent so that it would just throw it to the side of the rail.

Q. Did you give any further signal with the whistle after the regular crossing whistle sounded at a point 400 or thereabouts, [67] feet east of the crossing?

A. The bell ringing, that was all. I was not able to see the lines on the horses' backs until I got within about 75 feet of them. They were then slack. I

(Testimony of J. E. Woods.)

observed the team at that point, 75 feet away. There was no sign of any freight or anything on the part of the horses. They did not slacken speed at all until the very time of the accident. The team were coming from the south, going north. The team went in a generally northerly direction right on the crossing, and I went in a general westerly direction until the accident happened. I should judge the body part of the wagon was hit by the locomotive. There was as good a view of my train as I had of the wagon.

Cross-examination by Mr. WHEELER.

The WITNESS.—There is a house right in the middle of that curve. After I got around that curve, around the house, I could see the crossing. I testified I was about 150 or 200 feet from the crossing at that time. I did not measure it. From the time I saw this rig I kept my eyes on it. At no time did they make any effort to stop the rig that I know of. I couldn't tell whether he was going to make any effort or not to stop until I got up where I could see the lines. Up to that time he hadn't made any effort to stop, that I know of. I knew Mr. Chappell at that time. He had charge of the engine. I was to take orders from him, upon his giving me any signals, as far as it was safe. He gave the signal to leave the yards when he got on the engine. I did not see him from that time on until he jumped off at the crossing. He is supposed to stand on [68] the footboard, off to the side, and hold his lamp out there where I can see it. I was on the south side running the engine on that morning. The first time that I

(Testimony of J. E. Woods.)

appreciated the boy was in danger or the person with the team, if anybody, was in danger, was when I was 75 feet away from the crossing. I put on my brakes at that time. As to going past that crossing a distance of something like 241 feet—I don't know what it was; I think I said two or three car lengths. I could not say that I went past that crossing 241 or 247 feet, because I did not measure it. I don't know how far I went past it. I did not leave my engine that morning before it stopped. We went by one switch; we went by the first switch west of the crossing.

I have been an engineer since 1909, three years at that time, I guess. I had been working for the Milwaukee since August 22d, I believe. The accident occurred in November. It wouldn't have done no good to use sand around that curve; the pipes are bent so that it would throw the sand on the side of the rail, around a curve. None of the sand would have struck on the rails. I do not know whether it is a fact that the track is almost practically straight for a distance of 75 or 100 feet east of the crossing; I think it comes to a curve right to the crossing. The only whistle I blew was the distance of three or four hundred feet east of the crossing. I gave the ordinary crossing whistle. The rules of the company provide that that whistle shall be given something like 400 feet east of a crossing. In the event that you see an object upon the track, and you see they are not going to stop, and you have got time, you blow a lot of short whistles to warn them. I

(Testimony of J. E. Woods.)

blew no short whistles on this morning. When I saw he wasn't going to stop, I didn't have time to do anything else only apply the emergency [69] and did all I could to stop. I saw the team coming just as soon as I got out of the shadow of that house; I couldn't state how far that was from the railroad track; I didn't measure it. As to there being other railroad tracks in that neighborhood—the street-car I believe crosses the railroad track there. There are no other railroad tracks in that close proximity to the Milwaukee that I know of. The Northern Pacific track is probably a half a mile, or more, I should judge.

Redirect Examination by Mr. WHEELER.

Q. Now, at four o'clock, just prior to four o'clock, could you see Chappell where he was standing on the footboard?

A. No, I did not see him. He did not give me any signals at that time. I saw him for the first time, after he got on the train to go, when he jumped off at the crossing.

Witness excused.

Testimony of A. A. Grorud, for Defendant.

[70] A. A. GRORUD, called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. FURMAN.

The WITNESS.—My name is A. A. Grorud. I am Mr. Wheeler's law partner. I am interested in the disposition of this lawsuit. I went with Mr.

(Testimony of A. A. Grorud.)

Glover to take the measurements that are indicated on Plaintiff's Exhibit "A." Those measurements are put in in my handwriting. Mr. Glover drew the diagram, as near as I can remember. I held one end of the tap that was used that day, I think.

Witness excused.

Testimony of George T. Spaulding, for Defendant.

[71] GEORGE T. SPAULING, as witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. FURMAN.

The WITNESS.—My name is George T. Spaulding. I am traveling engineer for the Milwaukee railroad. I have occupied that position about five years. My duties are looking after the locomotives and the engine men generally. I have been in the railway service about 18 years; in the capacities of wiper, fireman, locomotive engineer, traveling engineer. I ran an engine between seven and eight years, in Iowa, Dakota, North and South Dakota, and Montana. I have not run engine for any other road but the Milwaukee; I fired a little for the Great Northern. I am familiar with the operation of braking apparatus. I know 1163, a switch-engine in the Butte yard. I am familiar with the braking apparatus on that engine.

Q. I will ask you to assume, Mr. Spaulding, the following statement of facts, which will constitute a hypothetical question. Assume that 1163, headed east, is backing to the west, drawing behind it 12

(Testimony of George T. Spaulding.)

loaded cars, with a total gross weight of 700 tons, at a rate of 8 miles or more per hour, at a distance of some 3 or 300 feet eastward from the street crossing of Montana Street, South Montana Street in the city of Butte, the track curves gradually to the southward, and the grade is from one-half to three-fourths of one per cent; a service application from 7 to 10 pounds is made to check the rate of speed of the train, preparatory to taking the curve; that service application is kept on until the speed of the train is *check* to six or less miles per hour; shortly thereafter, and a distance of 200 [72] feet or thereabouts farther to the west, and at a point approximately 75 feet or thereabouts, east of the crossing, the engineer discovers that there is a possibility of collision and undertakes to make an emergency application. The hour is four o'clock in the morning; it is the 5th day of November, and the air is clear; the rail is frosty; it is on a curve, under conditions in which no sand can be applied to the rail; the speed is approximately six miles an hour. In view of these conditions and under such circumstances, assuming them all to be true, what have you to say would be the reasonable distance within which that particular locomotive, under those conditions, could stop the train as described.

A. This first preliminary application to slow down had been released shortly before the application?

Q. It had been.

A. I should say from 150 to 175 feet. I reach that conclusion as a result of my observation.

(Testimony of George T. Spaulding.)

Cross-examination by Mr. WHEELER.

Q. Mr. Spaulding, assume that a switch-engine, 1163, is backing westward, pulling a train of 12 cars, loaded cars, with coal and coke, the total estimated weight of the train being 750 tons; and assume that it is going from the Butte yards to the Butte, Anaconda & Pacific transfer, and at a point estimated 150 feet east of Montana Street crossing, on a grade of one per cent, and upon a curve, the train is going at that time at a rate of speed estimated at eight miles an hour, and at that time the service application is made from 7 to 10 pounds' pressure, and continued for a known space, and then is released, and the train runs a little farther and then at a point 75 feet east of the crossing the emergency application is made, and [73] it is a clear, cold, crisp morning, and the rails frosty at the time that the emergency brake is applied or the emergency application is applied; the speed of the train is approximately six miles per hour; in view of these conditions in what space would you say it was reasonably probable that the train,—that a train could be brought to a stop?

A. I should say 150 feet.

I testified in a trial in which David Clement, Administrator, was plaintiff, and the Chicago, Milwaukee & St. Paul Railroad Company was defendant, growing out of this same accident. That very same question was asked me by Mr. Furman on direct examination at that time and in this courtroom at that trial. To the best of my memory my answer at that time was, "Well, I should say ninety feet; it would

(Testimony of George T. Spaulding.)

run upwards of ninety feet." That was my testimony at the former trial.

The sand is not used mostly upon the Milwaukee engines upon the curves. That is not the reason that sand is placed in the engines to be used largely when you are rounding curves. Same is used to some extent when rounding curves on the Milwaukee. I am familiar with Engine No. 1163.

Q. And I will ask you if it isn't a fact that on Engine No. 1163, if sand had gone down through the spout or whatever it is, the pipe, that it would have struck the rail in rounding the curve?

A. It may have, some of it struck the rail. If you use sand in connection with your emergency brake you can stop it in a less space of time than you could otherwise. If you released from the tank from seven to ten pounds of air, it would take upwards of 25 seconds, perhaps 30, 35, to refill that tank.

Q. Now, assume that you were going at a rate of six miles an hour, and that you were using engine No. 1163, that your [74] braking power was in good condition, and that you had 12 cars attached to that engine, 1163, and had an approximate tonnage of 700 tons, and the train was going over a grade of one-half of one per cent, and you used every means at your command, in what distance would you say that that train ought to be stopped?

A. Seventy-five feet.

Q. Well, isn't it a fact that you have seen, on numerous occasions, a train consisting of 12 cars, loaded gondola cars and ore cars loaded, being drawn

(Testimony of George T. Spaulding.)

by the same type of engine as 1163, and have seen them stopped in a space of from 15 to 25 feet?

A. Never.

I have never lived here. The grade from the Great Northern Railroad station in Butte over to the Butte, Anaconda & Pacific deposit, I should say was perhaps two-tenths of one per cent. I do not believe you could stop a train similar to the one you have described going over that track, in from 15 to 25 feet, going at six miles an hour. Six miles an hour is jogging right along; it is going a little faster than the ordinary walk.

Q. Now, would you say that going along with 12 cars, similar to the ones that have been described to you before, with 700 tonnage, and going at six miles an hour, over a grade of one-half of one per cent, with engine 1163, a switch engine which weighs, as I understand it, 65 tons, and you used your emergency and sanded the rails, would you say you couldn't stop that engine in less than 75 feet?

A. Yes, if you had the pipes of sand available, perhaps you could a little less; not a great deal less than that. You could not stop it in 40 feet. I have not made any particular tests since this accident on this particular piece; I have rode engines. The braking power on that engine was normal. [75] I was familiar with the breaking power of that engine at that time.

Q. I will ask you, Mr. Spaulding, this question,—it is practically the same. Would you say that going along with 12 cars, at the rate of six miles an hour,

(Testimony of George T. Spaulding.)

over one-half of one per cent grade, with an engine similar to 1163, a switch-engine, weighing 65 tons, and you used the emergency and sanded the rails, that you could stop it in a less distance than 80 feet?

A. Yes, sir.

Q. In what distance would you say that under those conditions that you could stop it?

A. 75 feet.

Q. Now, I will ask you if you didn't state, at the time that you testified at the former trial in this court, in the case of David Clement, Administrator, vs. Chicago, Milwaukee & St. Paul, et al., that your answer to that question, the identical question that I have just asked you, was not, "Perhaps ten feet, probably seventy feet."

A. I can't remember. I perhaps gave that testimony. I would say I was wrong, then, owing to the experience since that time. My experience convinces me that I was wrong at that time. As to whether is a rail as used several times with trains, it isn't very apt to be frosty—it is owing to how recently or how short a time previous that trains had passed over.

A track that was not used very much would be much more inclined to be frosty than one that was used several times of a night. If several trains ran over a track during the night it isn't very apt to be very frosty.

[76] Redirect Examination by Mr. FURMAN.

Q. In response to a hypothetical question asked you by me in this courtroom two years ago, in the case in which David Clement, as Administrator of the Estate

(Testimony of George T. Spaulding.)

of David Clement, Jr., deceased, was plaintiff, and this Milwaukee Railroad was the defendant, you responded to the hypothetical question that under given conditions, which are substantially the same as those I gave you now, a train would stop in about 90 feet, it would run upwards of 90 feet. Now you say from 150 to 175 feet. What have you to say with reference to the discrepancy between your testimony of two years ago and your testimony to-day?

A. I have had more experience in regard to the recent release just previous to an emergency application, in effect on the emergency application thereafter. The estimate that I made two years ago, of ninety feet, was rather short.

I know the grade east from Montana Street crossing; it is fifty-hundredths of one per cent, for a distance of 300 feet, and then it goes a number of hundred feet $75/100$ or three-fourths of one per cent; ascending going east, descending approaching the crossing. I am fairly familiar with the grade of Montana Street north and south from the crossing. The ground is slightly sloping to the north, if I am not mistaken. I could not state when I looked at that last; I take the car there occasionally; I observe the car approaching from the south, that is my only means of knowing. For 150 or 200 feet to the south, my judgment is that the road slopes slightly towards the track.

Recross-examination by Mr. WHEELER.

[77] The WITNESS.—I was working for the Chicago, Milwaukee & St. Paul Railway when I tes-

(Testimony of George T. Spaulding.)

tified in this courtroom two years ago. I was working in the same capacity at that time that I am now. I have been running engine every day since that time,—different engines. At that time I had been working the same period as an active engineer that I have now. I have been working as an active engineer about eight years.

Witness excused.

Testimony of A. B. Ford, for Defendant.

[78] A. B. FORD, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. FURMAN.

The WITNESS.—My name is A. B. Ford. I reside at Great Falls. I am a locomotive engineer. I have been in the railway service since 1892; during that time for the Great Northern and Northern Pacific. I have worked as machinist apprentice, machinist, locomotive fireman, engineer, traveling engineer, and master mechanic. I worked about four years as an engineer; about five years as a traveling engineer, about twelve years as master mechanic. During that time I have had occasion to observe and operate the braking apparatus on locomotives. I am familiar with the braking apparatus that is used on trains and locomotives.

Q. I will ask you, Mr. Ford, to accept as correct, this following statement of a hypothetical question: a switch-engine, weighing 65 tons, or thereabouts, with a sloping tender, an oil headlight in each end,

(Testimony of A. B. Ford.)

footboard at each end, headed west, is pulling a string of loaded cars, 12 in number, of a total gross weight of from 700 to 750 tons, down a grade which is 51/100 of one degree, around a curve, which will be, as you go west, a left curve, at a speed of eight miles per hour; approaching the curve a service application of air is made, of seven to ten pounds' pressure, which is maintained for a sufficient period to check the speed of the train from eight to ten miles an hour down to six or less miles an hour; thereafter, after a short interval of time, and when the engine is perhaps 200 feet farther to the west, and at a point 75 feet east of the street [79] crossing, the engineer observes the possibility of a collision, he seeks to make an emergency application to stop his train. In view of these conditions, under the situation that I have outlined, what would you say was the reasonably probable distance within which the train could be brought to a stop? No sand could be applied to the rail because of the fact of the curve in the track; the rail is frosty, the morning is clear and cold. Now, what would you say would be the reasonably probable distance in which the train could be brought to a stop under those different conditions?

A. Considering that he made a service application just before he endeavored to make an emergency application, it would be almost impossible to say just how far his train would go, as he could only get an ordinary service application, which is 20 pounds, and the brake cylinder pressure would have been reduced, so that he couldn't get a full service brake cylinder

(Testimony of A. B. Ford.)

pressure,—I would estimate the train would go from 150 to 200 feet. It is not possible to get an emergency application shortly after a service application has been made. As to how long a period of time it would take for the apparatus to come again into the position that would enable you to make an emergency application, after you make your service application—it depends on the number of cars; under the conditions, the 12 cars, I should say 30 or 40 seconds.

Cross-examination by Mr. WHEELER.

The WITNESS.—Supposing that the rails were not frosty, and that you sanded the rails, under the same speed, you could stop that engine in 60 or 75 feet, something like that.

Q. Now, assume, under like conditions, that you hadn't made [80] any service application in the first instance, and had sanded the rails, and that the rails were not frosty, what distance would you be able to stop it then?

A. The same emergency application?

Q. Well, the other time I ask you, I said assuming that you had drawn off the 7 to 10 pounds?

A. I don't understand that question that way.

Q. So that you would say that going at the rate of 6 miles an hour, a train drawing 12 gondolas, or 12 cars loaded, 700 tons, over a grade of one-half of one per cent, you would say that it would take 60 to 75 feet in which to stop it?

A. If you had sanded the rail, as you specified.

Q. Would you say it would take 60 to 75 feet?

A. For an emergency application. I don't be-

(Testimony of A. B. Ford.)

lieve you could stop it in any less than that distance, and perhaps more.

I never saw engine No. 1163. I never saw the Montana Street crossing and the grade there. If you draw off from 7 to 10 pounds of air, to equalize would take about 25 seconds; to recharge would take 30 or 40. If you put on a service application and stopped the train from running from 8 down to 6 miles an hour, and you put on a service application and drew down 7 to 10 pounds of air, it would take about 40 seconds to fully recharge. After you had fully recharged then you could make your emergency application, just the same as you could before. Under the conditions referred to in this testimony, I believe it would take 7 to 10 pounds of air to stop it or slow it up to six miles an hour. The frosty rail would make that condition; a frosty rail means when cars run over it it is greasy; what the railroad men term greasy. At that time of the year, the frost coming on the rail, the friction of the wheels running aver [81] the rails creates grease or moisture, what is termed a greasy rail. As to whether if several trains ran over the track in that night it would be as apt to be frosty—as it would otherwise be,—I couldn't tell, but I think it would be greasy; I think it would be moist. I don't know why it wouldn't be frosty even if several trains had run over during the night. If there were several trains close together, it might have some bearing, but far apart, I doubt if it would. It would be practically the same if one ran over it to-day and another one ran over in a week. I have been

(Testimony of A. B. Ford.)

working on the Great Northern between here and Great Falls. I am familiar with the various types of engines. We have no engines of the number of 1163. I am not familiar with the switch-engine of the Milwaukee. I cannot say whether there is any difference between the switch-engines of the Milwaukee and those of the Great Northern; I never looked up their details on their power. I have never worked for the Milwaukee.

Q. I will ask you if it isn't a fact that you can sand all of the curves on the Great Northern track between Butte and Great Falls, with the sand from the engine?

A. Not if the engines have a lateral; that is, wear on the driving-box, so that the engine will move over to one side of the rail, and allow the sand to go inside of the rail and outside of the rail. We get some sand on the rails going around curves.

Witness excused.

Testimony of W. G. Ward, for Defendant.

[82] W. G. WARD, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. FURMAN.

The WITNESS.—My name is W. G. Ward. I knew David Clement, Jr., in his lifetime; I chummed with him. During the time he was at the Industrial School I went out to see him; I think the first or second Sunday after he was out there.

Q. Now, what if anything, did he say to you with

respect to leaving his father's home?

Mr. WHEELER.—Just a moment. We object to that as being irrelevant, immaterial and incompetent, not tending to prove or disprove any issue in the case.

The COURT.—Sustained.

Mr. FURMAN.—Exception. May it please your Honor, we want to make an offer of proof.

Thereupon, the following offer of proof, in writing, was submitted by counsel for the defendant:

“Defendant's offer to prove by defendant's witness W. G. Ward, now on the stand, on the stand, that David Clements, Jr., told him at the Industrial School, on the first or second Sunday after Clements, Jr., was committed there that his father, David Clements, had kicked him out of the house and would not permit him to live at home any longer.”

Mr. WHEELER.—We object to it, on the ground and for the reason it is irrelevant, immaterial and incompetent, hearsay, not tending to prove or disprove any issue in the case.

The COURT.—Objection sustained.

Mr. FURMAN.—Exception.

[83] Mr. FURMAN.—Now, we have an instrument we are going to offer in evidence.

(The said instrument so offered in evidence is in words and figures as follows, to wit):

“In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

In the Matter of DAVE CLEMMENTS, Alleged Juvenile Disorderly person.

COMMITMENT.

Be it remembered that on the 3d day of May, 1912, a complaint was filed in the office of Justice of the Peace Charles Foley, charging the above-named Dave Clemments, with being Juvenile Disorderly Persons, and the same having been duly certified to and heard this day by this Court in the presence of said defendants: it is

ORDERED, ADJUDGED AND DECREED, that the said Dave Clemments, *are* Juvenile Disorderly persons.

II. That said Dave Clemments, be, and *they are* hereby committed to the Industrial School, established in School District No. 1, in the City of Butte, Montana, until discharged according to law.

Done in open court this 3d day of May, 1912.

MICHAEL DONLAN,

Judge.

The State of Montana,
County of Silver Bow,—ss.

I, John J. Foley, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for said County, do hereby certify that the foregoing is a true and [84] correct copy of the judgment of said court, duly made and entered

(Testimony of J. A. Brittian.)

of record, in the above-named matter, as truly taken and copied by me from the records in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 3d day of May, 1912.

JOHN J. FOLEY,

Clerk.

By D. W. Lewis,

Deputy Clerk.

[Court Seal].”

Mr. WHEELER.—We object to it on the ground and for the reason it is irrelevant, immaterial and incompetent, not tending to prove or disprove any issue in the case.

The COURT.—Objection sustained. The matter was heretofore testified to orally.

Mr. FURMAN.—Exception. The defense rests.

**Testimony of J. A. Brittian, for Plaintiff,
(Recalled in Rebuttal).**

[85] J. A. BRITTIAN, a witness heretofore called on behalf of the plaintiff, recalled in rebuttal, testified as follows:

Direct Examination by Mr. WHEELER.

The WITNESS.—I am familiar with curves. As to how much of a curve it is going around on the east side of Montana street there just before you get to the crossing—I cannot give it probably as a civil engineer would give it, but it is about a six degree curve, between five and six degrees.

On that degree of curve, most of the sand going

(Testimony of J. A. Brittian.)

down through the pipes upon that engine would light on the rail.

Witness excused.

Testimony of L. S. Groff, for Plaintiff (Recalled in Rebuttal).

[86] L. S. GROFF, a witness heretofore called on behalf of the plaintiff, recalled in rebuttal, testified as follows:

Direct Examination by Mr. WHEELER.

The WITNESS.—I am familiar with the pipes that let the sand down upon engines, and particularly upon engine 1163. As to whether the sand would strike the track when it came through the pipes on engine 1163—I should think it would all be able to go on the rail down there. I could not tell *tell* what the curve is down there; that is, I am not familiar. It is a very slight curve. At a point 75 feet east of there, east of the crossing, it is practically straight.

Cross-examination by Mr. FURMAN.

The WITNESS.—I never ran this engine myself. I worked with it. I was a yardmaster, and foreman on that engine; I was foreman on that engine for a long time. I wasn't working that morning.

Mr. WHEELER.—We rest, your Honor.

TESTIMONY CLOSED.

Whereupon, an adjournment was taken until the next day, Thursday, May 18, 1916, at ten o'clock A. M.

**[87] Motion for Order Directing Jury to Return
Verdict for Defendants.**

Now comes the defendants at the conclusion of the taking of testimony in this case and after counsel for the respective parties have announced that they rest, and move the Court for a directed verdict on behalf of defendants herein upon the grounds and for the reasons following, to wit:

I.

There has been a total failure of proof on the part of the plaintiff to establish any act of negligence or to establish any omission of ordinary care on the part of the defendants.

II.

The plaintiff has totally failed to prove the discovery of plaintiff's intestate, David Clement, Jr., in a place of peril.

III.

Plaintiff has totally failed to prove that after David Clement, Jr., came into a place of peril there was any failure on the part of the defendants or any of them to exercise ordinary care.

IV.

It appears affirmatively from the evidence that after plaintiff's decedent, David Clement, Jr., came into a place of peril and of danger no interval elapsed during which time it was possible for defendants, or any of them, in the exercise of ordinary, or any other degree of care, to avoid injuring and killing David Clement, Jr.

[88]

V.

It appears affirmatively from all of the evidence that the negligence of plaintiff's intestate, David Clement, Jr., concurred with the negligence of the defendants up to and producing the injury, and no recovery can be had in this case for under such circumstances there is no room for the application of the doctrine of the last clear chance.

Attorneys for Defendants.

[89] I think this is a case that must go to the jury for their determination. It would appear that according to the engineer's own testimony, and really that is the only testimony in the case in reference to when the engineer first saw the boy and first appreciated the boy was in danger, he first saw the boy when he came around the curve, saw the team and from that time kept his eyes on the team all the time. The team was going about 5 miles an hour, he was going about 8; he was some 330 feet possibly from the crossing. These two vehicles, the train and the team, were converging somewhat on an angle point to the crossing, he was going about 8 miles with the train. Taking his statements and perhaps from general testimony, he made some application of air as he came around the curve for the purpose of taking the curve which reduced him to about 6 miles. All Chappell could do amounted to nothing because Chappell couldn't stop the engine, couldn't say where the engineer, couldn't see. The engineer says it was 75 feet from the crossing when he appre-

ciated there was something wrong and he saw the lines were slack. He appreciated the team wasn't going to stop as the lines were slack. He could see that when 75 feet away. The team was probably a little nearer the track as the train was going a little faster yet the team beat the train slightly to the crossing. He says at that time he put on all the air he could, threw the brake into emergency any way 75 feet from the crossing. Now there is plenty of evidence that, if he had done what he says he did, he would have stopped short of the crossing and would not have come into collision with the boy at all. Even Chappell says, if he had used sand and the brakes were in good condition, and we would have a right to presume the brakes were in normal condition and have a right to presume that the railroad would run trains properly equipped,—Chappell says he could have stopped 25 or 40 feet which would have been enough to avoid the collision. Groff says he should say he could stop in 15 feet if everything was in a first [90] class condition, and he had a right to presume the brakes were in a normal condition. Brittain says, stop should be made from 20 to 25 feet. Of course the testimony or evidence for the defendant, I say of course in that I mean it would inevitably be so, the evidence for the defendant is by Spaulding that if the rails were frosty and not sanding the track it was reasonable and probable that it could be stopped within 150 or 175 feet. There is some evidence that the rails were frosty, and there is also some evidence that trains had passed over, nothing positive, but some evidence that the trains

did pass over and left the rails in a greasy condition. Again that will be for the jury to pass on. Spaulding also says that he had never seen any stops in 15 or 25 feet under such circumstances, but if sand were used perhaps the train would have been stopped in less than 75 feet but not in 40. Of course that even might have saved the boy. On the other hand even if it had left the collision the blow might have been so slight as to injure the wagon but might not have injured the boy at all or done any particular damage. Of course if sand had been used it would have decreased the speed of the train. An inference that might have been drawn is that the train might have entirely cleared the crossing. He did admit here at a former trial. He said that perhaps the train might have been stopped in 10 feet, probably in 70 feet. He said, "Perhaps I testified that way, I can't remember." The he says, "If I did I was wrong." I think he assumed then he did testify that way. He said, "I was wrong, I know it now from subsequent experience." Witness Ford says that 75 feet under the circumstances, track not sanded, and with frosty rail would be a reasonable and probable distance in which a stop could be made. Almost impossible to say as after having made surface application he could only get thereafter an ordinary surface application. Other witnesses were speaking in view of the previous slight surface application made in coming around the curve. Ford says he would describe [91] it going about 150 feet after surface application as it would take some seconds to fill up after the emergency had been ap-

plied, about 30 or 40 seconds. If rails were not frosty and sand were used stop could not be made under 60 or 75 feet with surface application. Did not believe he could stop any less. The Court appreciates the only question he is, and I suppose counsel does too, did the engineer do all that should have been expected in case of ordinary care after he appreciated the boy was in danger, or was he negligent in making up his judgment and waited too long? I don't think so, no reason to make that presumption. The engineer has a right to the presumption that the boy would stop. The railroad has a right of way and only when he appreciates the fact that there is danger he has got to make preparations to stop. He appreciated that fact when 75 feet from the crossing, he couldn't tell at 330 feet away. The railroad couldn't be expected to look out for everyone, they are expected to look out for the train. Often teams are driven up very close to the track. In this case there was no evidence of fright on the part of the team. The engine must have been running at 10 or 12 feet a second not over 9 feet a second. At the rate of 6 miles an hour it couldn't have been going that fast, if the engineer speaks truly. The collision must have been due to the air in the emergency, it did not go on until about the crossing. Mc Masters said, when he felt the brakes go on he was a few feet away from the crossing. He evidently meant a few feet away, he did not mean 75 feet. He judged that from the distance it was on the rear of the train which was travelling. His judgment was not good in stating where he was. Yet

that is for the jury to say. The emergency did not go on until about the crossing. If that is true, the question is whether the engineer did, when at 75 feet, exercise ordinary care in stopping, or whether he took a chance that the wagon would beat him over. Again that is only for the jury to [92] say. 9 seconds it must be admitted, 8 seconds from the time the engineer appreciated the danger, if he appreciated it at 75 feet, as he says he did, until they reached the crossing is pretty small time for taking steps to prevent a collision. Yet they are accustomed to emergencies and are not supposed to become excited. He did everything he could. The chances are he did not do wholly everything he could, an engineer does not have to do wholly everything he can. It is for the jury to say how much he could have done. The only question is did the engineer do all he could to prevent this collision after he appreciated the danger. It has nothing to do with the codes, but did he do all he could in the 9 seconds.

The motion will be denied.

Exception will be noted.

After argument by respective counsel the Court charged the jury:

[93] Thereupon, the jury, in charge of a sworn bailiff retired to consider of their verdict; and afterwards, on the 19th day of May, 1916, the jury returned into court with their verdict signed by their foreman, which verdict is in words and figures, as follows, to wit:

[Title of Court and Cause.]

We, the jury in the above-entitled action, find our verdict in favor of the plaintiff and against the defendants, and fix his damages in the sum of \$2500.

A. T. MORGAN,

Foreman.

To which verdict defendants then and there duly excepted.

That, thereafter, on the 19th day of May, 1916, the said verdict was filed by the clerk of said court in said cause, and thereupon the said jury were discharged from further consideration of the case.

That, thereafter, on the 22d day of May, A. D. 1916, the Court entered judgment on the verdict in favor of the plaintiff, to which order of the Court and judgment entered, counsel for defendants then and there duly excepted.

That, thereafter, on the 22d day of May, 1916, the Court granted the defendants thirty days in addition to statutory time in which to prepare and serve the proposed draft of bill of exceptions in said cause.

WHEREFORE, the defendants above named pray the Court that the foregoing bill of exceptions may be settled and allowed as and for a bill of exceptions showing all the evidence given on its said trial and the proceedings had therein.

SHELTON & FURMAN,

A. J. VERHEYEN,

Attorneys for Defendants.

[94] The COURT.—Gentlemen of the Jury, you have heard the evidence and the arguments in this

case, and it is now the time for the Court to deliver to you what is termed the instructions, mainly, the law that governs in cases of this sort,—the law that governs the rights of the parties, and the law that must guide you in determining your verdict in the case. You will remember that the jury always takes the law as given to them by the Court; the reason is that the Court always declares the law the same, so then cases are always tried according to settled law, for, if juries were free to take their own view of the law, one jury might have one view to-day and another jury a different view to-morrow, and a third jury still a different view on the third day, and so cases would not be tried according to the law as it really is, but in accordance with the different views that different juries might think it was, so your oath and your duty of course is to take the law from the court, but when it comes to what are the facts in the case, what does the evidence prove, or tend to prove, and what inferences of fact ought to be drawn from the evidence in the case, that is exclusively for you. You are responsible for a correct determination of the facts arrived at, in view of the rules of the law that the court gives to you; even if the Court should express an opinion upon the facts,—should say to you that it looks to it as though this were proven or that not proven, you are never bound by the opinion [95] of the Court on the facts, though, of course, if it coincides with your own opinion, you are not to reject that conclusion for the reason that the Court agrees with you in what the evidence proves. So remember that the Court is responsible for the law,

and that you take the law from the Court, and you are responsible for the facts.

This case is one wherein the plaintiff sues as the father of his deceased son; he sues the defendant, alleging that on a certain day in this city, the deceased boy was driving along the road coming to a railroad crossing, and that the defendant's servants saw the boy in time to have prevented the train from injuring him, and that instead of preventing the train from injuring him when they could have, they negligently and carelessly drove the engine against the team and the wagon and killed the boy, and the plaintiff says that because of that he has lost the boy's services from that time until the boy would have arrived at twenty-one years of age, and so the defendants are liable to him in the damages he has thereby suffered.

The defendants' answer to this deny that they were negligent at all, or that they, or their servants, were guilty of any negligence at that particular time. Under those circumstances, the burden is on the plaintiff to prove to your satisfaction, by a preponderance of the evidence, that the defendants were negligent, as he charges in this complaint. When I say the plaintiff must prove it by a [96] preponderance of the evidence, I mean by the greater weight of the evidence. If, on the other hand, the plaintiff has not proven by the greater weight of the evidence the negligence that he charges against these defendants, he fails in his case, and your verdict must be for the defendants. If, in your judgment, after you

have cast up all of the evidence in the light of the rules of the law that the Court will give to you, it seems to you that the evidence is evenly balanced, then the plaintiff has failed to produce a greater weight of the evidence, and again your verdict would be bound to be for the defendants, because it is not enough for a man to come into court and allege a cause of action against a defendant, but he must also prove it,—prove it to the satisfaction of the jury by the greater weight of the evidence. Of course, if the greater weight of the evidence is with the defendants, then the plaintiff has equally failed, and your verdict must be for the defendants. But if the greater weight of the evidence is in favor of the plaintiff, he is entitled to a verdict at your hands, and you are bound to render it to him.

When you come to consider the evidence and weigh it, you will remember that the credibility of all witnesses is for you to determine; that also is your province. You are to determine which witness tells the truth, which, in your judgment, is most likely to tell the truth, and you are to determine how much weight you will give to any and all evidence [97] of the witnesses; you are to determine what inferences you will draw from circumstances that seem to you to be proven by the greater weight of the evidence. When you come to determine the credibility of the witnesses, you see them on the witness-stand; you observe their demeanor, the manner in which they testify, the reasonableness or unreasonableness of the thing they tell you, the likelihood of the thing happening, the interest of the witnesses, the motive,

if they have any, that is apparent to you, and upon all considerations that in your judgment as men go to the credibility of other men, you determine where, and what witnesses are telling the truth, and how much weight you will give to their testimony. You determine that here as in your own business lines,—when you transact business you determine whether the man you are dealing with is telling the truth, and you do the same here, and that is entirely for you.

Now, this case seems to be about as follows: It is what is termed a case involving the last clear chance doctrine. It seems that early in the morning in November, about four o'clock, as I remember it, at a time of the year when it certainly was dark, save for such light as may have been given by the arclight, or reflected from the engine or lanterns, such as there were there, it seems the boy was driving along the road towards the railroad crossing, and he was in an enclosed milk-wagon with a load of milk in [98] cans and bottles. This milk-wagon had a glass front and sides. He was driving along when first seen at a slow trot, I think the witnesses fixed it at five, six or seven miles an hour, or something like that. Now, as the case stands, that boy driving as he did, up to and over that crossing, was himself negligent in the eyes of the law, because every man is supposed to recognize in a railroad crossing a signal of danger and look out for himself, and if these defendants coming up there, even if they had been negligent in approaching that crossing, if they had not seen the boy at all and run over him, the defendants would not be liable, because the

boy's negligence would counteract the defendants' negligence, and the case would hang in the balance, and the law would not allow one to recover for damages inflicted by the other. But by reason of the circumstances arises the last clear chance doctrine. That is, that if both parties were negligent, or the plaintiff's boy was negligent, yet, if the defendants see him in time to avoid doing him an injury by the exercise of ordinary care after they see him, and appreciate the danger that he is running into, and still, if they carelessly and negligently run him down, then they are liable, even though he was originally negligent. I think you can understand that by saying that supposing a man was sleeping on that crossing and a train came along and none of the men on the engine or train took any notice of him or saw him, and they killed him, the heirs of the dead [99] man could not recover, but if the railroad men see him sleeping on the track they have no right to run him down, if by reasonable care they could have avoided it, and if they fail to stop after they see him, and being still able, seeing him in time, by the exercise of ordinary care to avoid it.

Now, as this boy was coming along the crossing, this train was coming around the curve. Chappell tells you about 350 feet from the crossing he saw the boy. The road and railway were converging, the train coming from here and the boy from here; it seems there is a slight down grade there, and if you take the testimony of Chappell for it, the train was drifting, no steam on, running by its own momentum, down grade, about eight miles an hour. The

engineer, Woods, tells you, as he came around the curve he made a small service application to take the curve, seven pounds of air,—the average service application of air as used ordinarily for stops or slowing down on curves, called service application as contrasted with an emergency application, and he says that after he got within about 150 feet of the crossing or 200 feet from the crossing,—150 to 200 feet, he saw the team coming along at a trot, about five miles an hour, and after he went on a little further released the service application, and he saw the team was not going to stop,—he said he recognized the fact that the boy was coming into danger, apparently unobservant, when he, [100] Wood, with the engine, was about seventy-five feet from the crossing. At that time, according to the evidence of Chappell, and also of Wood I think, the train had been slowed down by this service application, to about six miles an hour. Now, it is evident from the rate at which this train and team were going, and the distances as given to you by Chappell,—Chappell says when the train was 230 feet from the crossing,—these are all estimates, gentlemen, and there is chance for leaway on either side, as it seems best to you to make it under all the circumstances,—Chappell says when the train was 330 feet from the crossing the boy was about 175 feet from the crossing, and when they came in contact there the train was traveling some faster in the first instance than the team was, but if the train was reduced to around six miles an hour when within seventy-five feet of the crossing, or thereabouts, as Wood says it was, when he first appreciated the boy's danger, it is probable that

the team and train were moving at about the same rate of speed. Now, here is the law with reference to that situation. The company and the defendants are liable for nothing until they saw and appreciated the boy's danger, and after that they were liable to exercise ordinary care to protect him. They had a right to assume up until that time that the team and the driver would stop when it came within such distance of the crossing, as the disposition of the team would permit safely to be done, and you can understand [101] the reason for that—that primarily the railroad had the right of way over that crossing. If a team and a railroad train are approaching the crossing at the same time and there is danger of collision, then the team is bound to stop and give the railroad the right of way because it can stop more readily than can a heavy train, or any train of cars, so an engineer, when he approaches a crossing and sees a team coming from a distance, is not bound to assume then and there that that team is going to negligently drive on a crossing. He has a right to assume that when he approaches within a reasonable distance it will stop. So, as when a man is crossing a street, and half a block away he sees an automobile coming, the auto is not obliged to stop then and there; he has a right to believe that the man will observe the auto and cross over or give the right of way or a chance to stop to avoid collision at the vital moment. So these defendants and the railroad are not chargeable with negligence, save when the engineer and Chappell, in so far as Chappell had charge of the engine, appreciated the fact that the boy was unobservant

and liable to get on the crossing. The engineer tells you he recognized that at about seventy-five feet; that is an estimate; you have a right to consider under all of the circumstances whether it is proper to give leaway one way or the other, whether it is more or less than seventy-five feet. There was some evidence that Chappell also recognized that the [102] boy was in danger. He does not tell us at just what point it was, as I remember it, where he finally concluded that the boy was in danger, and gave the signal to stop.

Mr. WHEELER.—He said seventy-five feet in his deposition, I think, your Honor.

The COURT.—I have no note or recollection of it, but at any rate his signals, if not seen by the engineer, would not aid the plaintiff any in this case, because, as I said before, it is only what a man sees under such circumstances, what you can hold him liable for, but Chappell says he could have turned the safety cock and put on the emergency, or turned some cock, angle-cock on the rear of the engine and applied the emergency brakes as well as the engineer, but he says he was relying on the engineer to perform his own duties, and he had a right to assume that the engineer got his signal; he is trying to free himself, because they ask damages from Woods and Chappell also, and he says that when he saw there was going to be a collision he jumped off the engine and made an endeavor to kick open the angle-cock.

Now, it would be for you to say, in view of the fact that he was only the conductor, whether he was negligent and did not exercise ordinary care in not

applying that angle-cock himself in sufficient time, or whether he was justified in waiting as he did do, and is not guilty of a lack of ordinary care because he failed to kick open the angle-cock,— [103] missed it at the last moment, when he leaped from the engine, so far as Chappell is concerned.

Woods tells you that when he recognized the boy was in danger, when he was about seventy-five feet from the crossing, that he did all he could; he drew in the air and applied the emergency, and he tells you, and others tell you the same thing, and there is no contradiction of that, that the emergency did not work as well at that time, because of the previous application of service air; all of the witnesses who testified on the point say the same thing. Britton, for the plaintiff, tells you that if there was a little service application first, it would probably affect the distance in which the train could be stopped by the subsequent application of the emergency air, or making an emergency stop. He does not tell us how far; he has left that indefinite; I think, however, that that is easily within your comprehension; of some of the air has been used, drawn out of the reservoirs, before you can get the full force of full reservoirs, naturally they must have been filled up again, so you have that in mind in arriving at the conclusion whether the engineer did all he could. Remember the railroad is not responsible because the air was taken down before the engineer appreciated that the boy was in danger; he had a right to make that application coming around the curve, and the defendants are not chargeable with

negligence until after it was appreciated by the employees [104] of the railroad company that the boy was in danger. Take the situation as it was, and not go back and try to say they were negligent in not having full reservoirs of air at the particular moment. Woods tells you he applied this air at seventy-five feet. You heard the testimony of the brakeman who stood on the rear of the train, which also was an estimate, that the emergency was not applied until about at the crossing. What he meant by "about" is not explained to us by him. You will have to judge of that by your common experience. Did he mean a short distance, a few feet,—is that what he meant or men would mean by "about," or could he mean as much as seventy-five feet. For myself I think the fair inference would be that it was applied practically at the crossing, but you are not bound by my opinion. You draw those inferences of fact for yourself. But there are other circumstances you must have in mind. Remember the testimony is that it was a clear and a frosty night,—frost on the railroad tracks. There is testimony by Chappell that several trains had gone over those rails that night. How long before this four o'clock accident, when the tragedy happened is not disclosed; whether the frost would renew itself before this particular train came along you must conclude, calling again upon your common experience. Some of the witnesses for the defendant tell you that while certainly the passage of trains over the rails would remove some of the frost, whether it was off [105] at that time would depend on

the time when those trains passed in relation to this particular train that did the injury. You understand that also. Some of the witnesses for the defense say that if trains had recently passed they would take the frost from the rails; the passage of the train would create heat; that would leave the rails moist and greasy, and that under those circumstances the emergency brake would not, or any brake would not work as well. It is all the same brakes,—emergency because they apply it at once. Then there is another circumstance you have a right to assume, even if there is no proof, that this engine was provided with sand, because that is the customary rule of railroads, that engines are provided with sand. The engineer tells you that he did not apply any sand there because it was on a curve and would not fall on the rails and so would do no good, and I think that is the only reason he gives for not applying sand. You have the testimony of other witnesses, also for the defense, that some of the sand probably would have gone upon the rails, and you have testimony on the part of the plaintiff, I think from Groff and Britton, that with that engine, sand at that particular place would have gone on the rails, because seventy-five feet from the crossing, for the last seventy-five feet to the crossing, the curve is very slight,—I think Groff said it was practically straight, and so the sand would have gone upon the rails, and so to that extent that you will be able [106] to determine would have counteracted the effect of the frost and the moisture, if any there was, upon the rails. The engineer applied no sand; he

gave you his reason. You will appreciate of course in determining this case that the time from the time the engineer says he appreciated the danger until the actual collision was very brief. If when he saw the boy and appreciated his danger, not when he first saw him, because until he appreciated the danger is the point from where the negligence is chargeable,—if, from the time he appreciated the danger, if seventy-five feet from the crossing, and if the train was going six miles an hour, it would take that train about,—a little more than eight seconds, eight and one-half seconds to reach the crossing, and it is for you to say whether under the circumstances that engineer exercised ordinary care to avoid injuring the boy. Remember that ordinary care means care suited to the occasion. You can understand that a degree of care with which one thing will be done would be absolute carelessness and negligence in doing some other thing that required more care. You can handle cordwood much more roughly than you can handle plate glass, and yet you might handle the cordwood with ordinary care, which would be great carelessness in handling plate glass. When it comes to avoiding collision to save a human life, ordinary care means the highest degree of care that a human can be capable of. He was bound to do everything an engineer at that time and [107] place could have done. He did not get excited; he has not told us so. He has full command of his faculties, and it is for you to say whether in applying the emergency, as he says he

did, if he did, whether that was ordinary care and relieve him of the charge of negligence. Of course, if he and Chappell were not negligent, the railroad company was not, because negligence of a railroad company is nothing more than the negligence of its employees, Chappell and Woods,—it can only be negligent through its employees. Did the engineer exercise ordinary care under the circumstances, to avoid a collision with that boy, or the wagon in which the boy was, after he, the engineer, appreciated that the boy was getting into danger, and that a collision was *eminent*? If the engineer acted with that degree of ordinary care, and if Chappell acted with the ordinary care that he ought to have used at that particular time, remembering that he was not the engineer, then your verdict should be for the defendant. If, on the other hand, under all the circumstances, you determine that the engineer did not act with ordinary care, then your verdict must be for the plaintiff.

And then, if you come to that point that you have determined that your verdict, in view of the law as given to you by the Court, and the facts as you find them, is for the plaintiff, then you are to determine what damages the plaintiff is entitled to, and that means what damages has he [108] suffered by reason of the death of the boy. The damages in this case are only those in a pecuniary or money sense; nothing is to be allowed for the loss of a child, for grief or damaged affections, or anything of that sort, or for loss of society or companionship of the child. A husband or wife who lose the other like that have

right to damages, but not for the loss of a child. The only damages due to a parent where a minor child is killed, are the loss of services, the loss of the money value that those services would have been to the father, whether services rendered direct to the father, or in the employ of somebody else. You know that a father has a right to call on a minor child for all his services, of a minor child, until twenty-one years of age, and that is the reason why, when that child is killed by the negligence of another, the father has a right to demand what he has lost. In arriving at what he has lost you always deduct the expense that the father would have been put to for clothing for the boy and educating him, until he would reach the age of twenty-one. It is the profit that the boy would have been to the father. If it comes to a case where you believe that the boy would be a greater expense to the father than a profit, then he would not be entitled to any damages, because he has not lost any money. That is the basis on which these cases are decided. The law is that after the evidence is all before you, and you have heard the rules of law, you are to allow such damages, [109] if you feel any have been imposed on the father, as under all the circumstances of the case seem to your honest judgment just, and that is the pecuniary damage in loss of service that the father has suffered, the profit that he would have made on it, over and above the expense that the boy would have been to him. In arriving at that you must call again upon your common experience. There is no evidence here of what the boy was earn-

ing a month; there is no evidence of what the boy was earning or the expense while living at home he would be to the father. You call upon your judgment as men to determine those facts for yourselves. You must have in mind that if the boy worked away from home he might not have worked steadily, or that there might have been times when he could be sick or out of employment and an expense to the father rather than an instrument of profit, and you have a right to bear in mind that the boy might die before he reached twenty-one years of age, and having all those matters in mind, you determine how much the services of the boy to the father would probably have been, and then when you determine that, how much the father would have received for about five years,—the boy was within a month of sixteen years old, then you determine the present value of that, whatever the father would get from the boy if he lived the five years, and you will all understand that if you are going to give a lump sum, you will have in mind what it would have taken the father five years [110] to get; a smaller lump sum total to-day would be the equivalent of what it would take five years to get. A member of your number is engaged in the insurance business and understands that. If you are entitled to one hundred dollars for five years, you would of course take less than that to-day, because you would have it all in hand and would not be required to wait to get the full sum.

I thing the evidence is pretty well before you in reference to this boy. There is testimony by some

witnesses that he was a good well-disposed boy inclined to work, when he was working for Glover, performed his duties, and was reliable and dependable. There is some evidence that the boy had been in the industrial school. I am not saying how you would look at that. For myself, I would not be inclined to say that would impeach his character. They put boys in the industrial school on slight provocation nowadays. It is for the parents to discipline boys. I don't think the father in this case was justified in putting that boy in the industrial school, simply because he rustled junk. He does not say that the boy rustled junk dishonestly; that is not in itself an offense. Anybody has a right to property others have abandoned, and I would not say that that reflected anything on the boy. He had a right to reform anyhow. And when you take into consideration that this boy found for himself a job in the country and got up at four o'clock in the morning and drove a wagon and was a [111] good dependable boy, I think there was some evidence of stability about him even at that age, but in coming to a conclusion you are not to be moved by sympathy. We have not a right to be tender hearted, and if we do not believe there is a legal right in the plaintiff we cannot be moved by sympathy. You have a right to be sympathetic out of your own pocket, but not out of anothers, or to take money out of another man's pocket out of sympathy, either in a courtroom or out of a courtroom. It is a straight legal proposition. You are public officers; you are officers of this Court, sworn to render a true and just ver-

dict, in accordance with the law and the evidence, not in accordance with either prejudice or sympathy.

I don't know of anything else I need to instruct you upon. Remember it is for you to determine the facts under the rules of law that the Court has given. When you retire to the jury-room you will select a member of the jury foreman, and twelve must agree on any verdict.

Are there any objections or exceptions?

Mr. WHEELER.—The plaintiff is satisfied.

Mr. FURMAN.—The defendant is satisfied.

[112] Service of the above and foregoing bill of exceptions accepted, and copy thereof received, this 13th day of June, A. D. 1916.

B. K. WHEELER,
Attorneys for Plaintiff.

I hereby certify that the above and foregoing bill of exceptions is a true and correct bill of exceptions and order that the same be signed, settled, allowed and filed this 19 day of Oct., 1916.

BOURQUIN,
Judge.

[Endorsed]: Title of Court and Cause. Bill of Exceptions. Received at Clerk's Office June 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy. Filed Oct. 19, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy Clerk. Shelton & Furman, A. J. Verheyen, Attys. for Defts.

[113] And thereafter, to wit, on the 20th day of November, 1916, Remission of Judgment was filed herein, which is entered of record as follows, to wit:

In the District Court of the United States, District of Montana.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,

Defendant.

Remission of Judgment.

I, the undersigned, plaintiff in the above-entitled action hereby accept the sum of One thousand five hundred (\$1500) dollars, as the judgment in the above-entitled action, and agree to the reduction of the said judgment from two thousand five hundred (\$2,500) dollars, to one thousand five hundred (\$1500) dollars, as directed in the order of the Honorable George M. Bourquin, presiding Judge, given and made and rendered on the 13th day of November, 1916.

DAVID CLEMENT.

We, the undersigned, attorneys for the above-named plaintiff hereby agree to the reduction in the above-entitled action to the sum of one thousand five hundred (\$1500) dollars.

B. K. WHEELER,
Attorney for Plaintiff.

Service of the above remission of judgment is hereby acknowledged and copy thereof received this 20th day of November, 1916.

SHELTON & FURMAN,
A. J. VERHEYEN,
Attorneys for Defendants.

[114] [Endorsed]: Title of Court and Cause. Remission of Judgment. Filed Nov. 20, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy Clerk. B. K. Wheeler, Attorney for Plaintiff.

[115] And thereafter, to wit, on the 13th day of December, 1916, Assignment of Errors was filed herein, which is entered of record as follows, to wit:
*In the District Court of the United States for the
District of Montana.*

No. 123.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a Corpo-
ration, J. E. WOODS and M. I. CHAPPELL,
Defendants.

Assignment of Errors.

Plaintiffs in error, defendants above named, in connection with their petition for writ of error here-

in, specify the following particulars wherein error was committed in said cause:

I.

ERRORS OF LAW.

1. The Court erred in overruling defendants' separate demurrer, for the reason that

a. The complaint fails to allege discovery by the defendants, or any of them, of David Clement, Jr., in a place of peril.

b. It is evident from the complaint that David Clement, Jr., drove upon the defendant corporations' railroad track into a place of danger, without looking or listening.

2. The Court erred in denying defendants' motion [116] for a directed verdict, made on their behalf at the conclusion of the taking of testimony, for the reason that

I.

a. There has been a total failure of proof on the part of the plaintiff to establish any act of negligence or to establish any omission of ordinary care on the part of the defendants.

II.

b. The plaintiff has totally failed to prove the discovery of David Clement, Jr., in a place of peril.

III.

c. Plaintiff has totally failed to prove that after David Clement, Jr., came into a place of peril there was any failure on the part of the defendants, or any of them to exercise ordinary care.

IV.

d. It appeared affirmatively from the evidence that after David Clement, Jr., came into a place of

peril and of danger no interval elapsed during which time it was possible for defendants, or any of them, in the exercise of ordinary, or any other degree of care, to avoid injuring and killing David Clement, Jr.

V.

e. It appeared affirmatively from all of the evidence that the negligence of David Clement, Jr., concurred with the negligence of the defendants up to and producing the injury, and no recovery can be had in this case for under such circumstances there is no room for the application of the doctrine of the last clear chance.

3. The Court erred in entering judgment upon the verdict for the plaintiff, for the reason that:

[117] a. The evidence is not sufficient to support a verdict for the reason that

1. Under the pleadings the plaintiff relies on the doctrine of the last clear chance, and fails to prove discovery.

2. The evidence conclusively shows concurrent negligence on the part of David Clement, Jr.

3. The evidence shows that the verdict is excessive and that excessive damages appear to have been given under the influence of passion and prejudice.

II.

ERRORS RELATING TO THE ADMISSION AND REJECTING OF TESTIMONY.

1. The Court erred in overruling defendants objection to the question asked of plaintiff's witness, David Clement, on direct examination, in the following respect:

“Q. Mr. Clement, what have you to say with reference to the boy, as to whether or not he was industrious, and so forth?

“Mr. FURMAN.—We object to that, on the ground it is unduly leading and suggestive; it doesn’t appear necessary to lead or suggest to the witness the line of testimony desired.

“The COURT.—Well, it only points attention to what counsel means by disposition. Overruled. Isn’t it admitted by the answer? Well, anyway. Proceed. The objection is overruled.

“Mr. FURMAN.—Exception.

(2) “Q. What was the boy’s—was anything said by the boy to you with reference to his going back to school?

“Mr. FURMAN.—Just a minute. We object to that on the ground that is hearsay, it is irrelevant.

“The COURT.—Oh, it would have a tendency to show the possible or probable amount that the boy would have contributed to the father; I am not clear whether it makes for the benefit of the plaintiff or the defendant; he may answer; the objection is overruled.

[118] 2. The Court erred in sustaining plaintiff’s objection to the question asked of the witness James B. Glover, on cross-examination, in the following respect:

(3) “Q. Was that the first information that you had respecting him?

“Mr. WHEELER.—We object to it as being irrelevant and immaterial, and incompetent, not

tending to prove or disprove any issue. He says he first met him at the ranch.

"The COURT.—I think so. Objection sustained.

"Mr. FURMAN.—Exception.

3. The Court erred in sustaining plaintiff's objection to the offer of proof to be made by plaintiff's witness, James B. Glover, on cross-examination, in the following respect:

"(Whereupon the following offer in writing was submitted.)

(4) Defendant offers to prove by plaintiff's witness Glover, now on the stand, that he first heard of David Clement, Junior, when the said Clement was sleeping in a barn belonging to witnesses' brother-in-law, Al Congdon. That the said time was shortly prior to the time Clement, Jr., started working for witness."

"Mr. WHEELER.—We object to the offer on the ground it is incompetent, irrelevant and immaterial, improper cross-examination, not proving or tending to prove any issue in the case.

"The COURT.—Objection sustained.

"Mr. FURMAN.—Exception.

4. The Court erred in sustaining plaintiff's objection to the question asked of defendants' witness W. G. Ward, on direct examination, in the following respect:

[119] (5) "The WITNESS.—My name is W. G. Ward. I knew David Clement, Jr., in his lifetime; I chummed with him. During the time he was at the Industrial School I went out to

see him. I think the first or second Sunday after he was out there.

“Q. Now, what if anything, did he say to you with respect to leaving his father’s home?

“Mr. WHEELER.—Just a moment. We object to that as being irrelevant, immaterial and incompetent, not tending to prove or disprove any issue in the case.

“The COURT.—Sustained.

“Mr. FURMAN.—Exception.

5. The Court erred in sustaining plaintiff’s objection to the offer of proof made by the defendant, in the following respect:

(6) “Mr. FURMAN.—May it please your Honor, we want to make an offer of proof. (Thereupon the following offer of proof, in writing, was submitted by counsel for the defendant:

Defendants offer to prove by defendants’ witness W. G. Ward, now on the stand, that David Clements, Jr., told him at the Industrial School, on the first or second Sunday after Clements, Jr., was committed there that his father, David Clements, had kicked him out of the house and would not permit him to live at home any longer.”

“Mr. WHEELER.—We object to it, on the ground and for the reason it is irrelevant, immaterial and incompetent, hearsay, not tending to prove or disprove any issue in the case.

“The COURT.—Objection sustained.

“Mr. FURMAN.—Exception.

[120] The Court erred in sustaining plain-

tiff's objection to the offer of proof made by defendants of the commitment of David Clement, Jr., to the Industrial School, in the following respect:

“Mr. FURMAN.—Now, we have an instrument we are going to offer in evidence. (The said instrument so offered in evidence is in words and figures as follows, to wit:

“In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

In the Matter of DAVE CLEMMENTS, Alleged
Juvenile Disorderly Person.

COMMITMENT.

Be it remembered that on the 3d day of May, 1912, a complaint was filed in the office of Justice of the Peace, Charles Foley, charging the above-named Dave Clemments, with being Juvenile Disorderly Person, and the same having been duly certified to and heard this day by this Court in the presence of said defendants, it is

ORDERED, ADJUDGED AND DECREED,
That the said Dave Clemments, *are* Juvenile Disorderly Person.

II. That said Dave Clemments, be, and *they are* hereby committed to the Industrial School, established in School District No. 1 in the City of Butte, Montana, until discharged according to law.

Done in open court this 3d day of May, 1912.

[Court Seal]

MICHAEL DONLAN,

Judge.

“Mr. WHEELER.—We object to it on the ground and for the reason it is irrelevant, immaterial and incompetent, not tending to prove or disprove any issue in the case.

[121] “The COURT.—Objection sustained. The matter was heretofore testified to orally.

“Mr. FURMAN.—Exception. The defense rests.

WHEREFORE, defendants above named, pray that the petition for writ of error be granted; and that, for the reasons aforesaid, and for divers and sundry other reasons, the judgment entered herein on the 22d day of May, 1916, in the sum of twenty-five hundred (\$2500) dollars, and which said judgment was reduced, by order of the Court, to fifteen hundred (\$1500) dollars, on the — day of Nov., A. D. 1916, and accepted by plaintiff on the 20th day of Nov., A. D. 1916; which said judgment was suspended by the filing of defendants’ petition for new trial on the — day of —, A. D. 1916, and re-entered by the order denying a new trial made and entered on the — day of —, A. D. 1916.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Defendants, Plaintiffs in Error.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed Dec. 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy. Shelton & Furman, A. J. Verheyen, Attys. for Defts., Plffs. in Error.

[122] And thereafter, to wit, one the 13th day of December, 1916, Petition for Writ of Error was filed herein, which is entered of record as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

No. 123.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a Corporation;
CHICAGO, MILWAUKEE AND PUGET
SOUND RAILWAY COMPANY, a Corpo-
ration, J. E. WOODS and M. I. CHAPPELL,
Defendants.

Petition for Writ of Error.

Now comes Chicago, Milwaukee & St. Paul Rail-
way Company, a corporation, Chicago, Milwaukee
& Puget Sound Railway Company, a corporation,
J. E. Woods, and M. I. Chappell, defendants herein
and say;

That on or about the 22d day of May, A. D. 1916,
this Court entered judgment herein in favor of the
plaintiff and against these defendants, and which
said judgment was reduced by order of the Court to
\$1500 on the 13th day of Nov., 1916, and accepted by
plaintiff on the 20th day of Nov., 1916, in which said
judgment and the proceedings had prior thereunto
in this said cause, certain manifest errors have in-

tervened and were committed, to the grave prejudice of these said defendants—all of which will, in more detail appear from the Assignment of Errors filed with this petition.

WHEREFORE, defendants, feeling themselves aggrieved by the said judgment, come now and pray the Court for an order allowing the said defendants to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided for the [123] correction of the errors so complained of; that an order be made fixing the amount of supersedeas bond in this said case; and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

And the said defendants herewith submit their assignment of errors in accordance with the rules of the United States Circuit Court of Appeals and the course and practice of this Honorable Court.

And your petitioners will ever pray.

GEORGE F. SHELTON,

FRED J. FURMAN.

A. J. VERHEYEN.

[Endorsed]: Title of Court and Cause. Petition for Writ of Error. Filed Dec. 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy. Shelton & Furman, A. J. Verheyen, Attys. for Defts., Plffs. in Error.

[124] And thereafter, to wit, on the 13th day of December, 1916, an Order Allowing Writ of Error, was entered herein, which is entered of Record as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

No. 123.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a Corporation;
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a Corpo-
ration, J. E. WOODS and M. I. CHAPPELL,
Defendants.

Order Allowing Writ of Error.

On this 13th day of December, A. D. 1916, came the defendants herein, by their attorneys, and filed herein and presented to the Court their petition praying for the allowance of a writ of error, together with an assignment of errors intended to be urged by them; praying also that an order be made fixing a supersedeas bond; and praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the said defendants' giving bond according to law in the sum of three thousand dollars (\$3000).

BOURGUIN,

Judge of the District Court of the United States, for the District of Montana.

[125] [Endorsed]: No. 123. District Court of the United States, for the District of Montana. David Clement, Plaintiff, vs. Chicago, Milwaukee & St. Paul Railway Company, a Corporation, et al., Defendants. Order Allowing Writ of Error. Filed Dec. 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy.

[126] And thereafter, to wit, on the 13th day of December, 1916, Bond on Writ of Error was filed herein, which is entered of record as follows, to wit:

In the District Court of the United States, for the District of Montana.

No. 123.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation; CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a Corporation; J. E. WOODS and M. I. CHAPPELL,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, J. K. Heslet and Alex. J. Johnston, as sureties, are held and firmly bound unto plaintiff, David Clement, in the full and just sum of three hundred (\$300) dollars, to be paid to the said David Clement, his executors, administrators, or assigns, to which payment, well and truly to be made, we do hereby bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 13th day of December, A. D. 1916.

WHEREAS, lately, at a District Court of the United States, for the District of Montana, in a suit pending in the said court, between the said David Clement, plaintiff, and the said Chicago, Milwaukee & St. Paul Railway Company (a corporation), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods and M. I. Chappell, defendants, a judgment was rendered against the said defendants; and the said defendants, having thereafter obtained a writ of error, and filed a copy thereof in the clerk's [127] office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said David Clement, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the — day of — next;

NOW, THEREFORE, the condition of the foregoing obligation is such that if the said defendants

shall prosecute the said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

J. K. HESLET.

ALEX J. JOHNSTON.

United States of America,
State and District of Montana,
County of Silver Bow,—ss.

J. K. Heslet and Alex J. Johnston, being severally duly sworn, on oath, each for himself says: that he is one of the sureties who subscribed the above and foregoing bond; that he is a resident and householder within the city of Butte, county of Silver Bow, State of Montana, and is worth the sum mentioned in the said undertaking, over and above all the just debts and liabilities, exclusive of property exempt from execution.

J. K. HESLET.

ALEX. J. JOHNSTON.

[128] Subscribed and sworn to before me this 13th day of December, A. D. 1916.

[Seal] A. J. VERHEYEN,
Notary Public for the State of Montana, Residing at
Butte, Montana.

My commission expires Jan. 23d, 1918.

Approved by:

BOURQUIN,

United States District Judge for the District of
Montana.

[Endorsed]: Title of Court and Cause. Bond on
Writ of Error. Filed Dec. 13, 1916. Geo. W.

Sproule, Clerk. By Harry H. Walker, Deputy.
Shelton & Furman, A. J. Verheyen, Attys. for Defts.
Plffs. in Error.

[129] And thereafter, to wit, on the 13th day of December, 1916, Supersedeas Bond on Writ of Error was filed herein, which is entered of record as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

No. 123.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation; CHI-
CAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY, a Corporation; J.
E. WOODS and M. I. CHAPPELL,

Defendants.

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, Chicago, Milwaukee & St. Paul Railway Company (a corporation), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods, and M. I. Chappell, as principals, and J. K. Heslet and Alex J. Johnston, as sureties, are held and firmly bound unto David Clement, plaintiff above named, in the full and just sum of three thousand (\$3000) dollars, to be paid to the said David Clement, plaintiff, as aforesaid, his certain attor-

neys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals, and dated this 13th day of December, A. D. 1916.

WHEREAS, lately, at a District Court of the United States, for the District of Montana, in a suit pending in the said court, between the said David Clement, plaintiff, and the said Chicago, Milwaukee & St. Paul Railway Company [130] (a corporation), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods, and M. I. Chappell, defendants, a judgment was rendered against the said defendants; and the said defendants, having thereafter obtained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said David Clement, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the — day of ——— next;

NOW, THEREFORE, the condition of the foregoing obligation is such that if the said defendants shall prosecute the said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then this obligation shall be void;

otherwise to remain in full force and virtue.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY.

CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY.

J. E. WOODS,

M. I. CHAPPELL.

By A. J. VERHEYEN,

Their Attorney.

[131] J. K. HESLET.

ALEX J. JOHNSTON.

United States of America,
State and District of Montana,
County of Silver Bow,—ss.

J. K. Heslet and Alex J. Johnston, being severally duly sworn, on oath, each for himself says: that he is one of the sureties who subscribed the above and foregoing bond; that he is a resident and householder within the City of Butte, County of Silver Bow, State of Montana, and is worth the sum mentioned in the said undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

ALEX J. JOHNSTON.

J. K. HESLET.

Subscribed and sworn to before me this 13th day of December, 1916.

[Seal]

A. J. VERHEYEN,

Notary Public for the State of Montana, Residing at
Butte, Montana.

My commission expires Jan. 23, 1918.

Approved by:

BOURQUIN,

United States District Judge for the District of
Montana.

[Endorsed]: Title of Court and Cause. Super-
sedeas Bond on Writ of Error. Filed Dec. 13, 1916.
Geo. W. Sproule, Clerk. By Harry H. Walker,
Deputy. Shelton & Furman, A. J. Verheyen, Attys.
for Defts. Plffs. in Error.

[132] And thereafter, to wit, on the 13th day of
December, 1916, a Writ of Error was duly issued
herein, and thereafter on the 13th day of December,
1916, filed herein, which is as follows, to wit:

[133] *In the United States Circuit Court of
Appeals, in and for the Ninth Circuit.*

Writ of Error.

United States of America,
District of Montana,—ss.

The President of the United States, to the Honor-
able, the District Court of the United States for
the District of Montana, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment, of a plea which is in
said District Court before you, between David Cle-
ment, plaintiff, and Chicago, Milwaukee & St. Paul
Railway Company (a corporation), Chicago, Mil-
waukee & Puget Sound Railway Company (a cor-
poration), J. E. Woods, and M. I. Chappell, defend-
ants, a manifest error hath happened, to the great

damage of the said defendants, as by their petition and assignment of errors appears, we, being willing that error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, in said Circuit, on [134] the 13th day of January next, within thirty (30) days hereof, to be then and there held, that, the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Hon. EDWARD DOUGLASS WHITE, Chief Justice of the United States, and the seal of the said District Court of the United States for the District of Montana, this 13th day of December, A. D. 1916, and in the one hundred and forty-first year of the Independence of the United States of America.

[Seal] GEO. W. SPROULE,
Clerk of the District Court of the United States, for
the District of Montana.

By Harry H. Walker,
Deputy.

Allowed by:

BOURQUIN,

United States District Judge, for the District of
Montana.

Service of the above and foregoing Writ of Error
is hereby admitted, and receipt of copy thereof ac-
knowledged, this 13th day of December, A. D. 1916.

WHEELER & GRORUD,

Attorneys for Plaintiff in Said District Court of the
United States for the District of Montana, De-
fendant in Error.

[135] Answer of Court to Writ of Error.

The Answer of the Honorable, the District Judge
of the United States for the District of Montana,
to the foregoing Writ:

The record and proceedings whereof mention is
within made, with all things touching the same, I
certify, under the seal of the said District Court of
the United States, to the United States Circuit Court
of Appeals for the Ninth Circuit, within mentioned,
at the day and place within contained, in a certain
schedule to this writ annexed, as within I am com-
manded.

By the Court,

[Seal]

GEO. W. SPROULE,

Clerk.

By Harry H. Walker,

Deputy.

[136] [Endorsed]: No. 123. District Court of
the United States, for the District of Montana,
David Clement, Plaintiff, vs. Chicago, Milwaukee &

St. Paul Railway Company, a Corporation, et al.,
Defendants. Writ of Error. Filed Dec. 13, 1916.
Geo. W. Sproule, Clerk. By Harry H. Walker,
Deputy.

[137] And thereafter, to wit, on the 13th day of December, 1916, a Citation was duly issued herein, and thereafter on the 13th day of December, 1916, filed herein being as follows to wit:

[138] *In the United States Circuit Court of Appeals, in and for the Ninth Circuit.*

Citation of Writ of Error.

United States of America,

District of Montana,—ss.

The President of the United States to David Clement, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, California, on the 12 day of Jan., 1917, next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Montana, wherein Chicago, Milwaukee & St. Paul Railway Company (a corporation), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods, and M. I. Chappell, defendants in said District Court, are plaintiffs in error, and you, the said David Clement, plaintiff in said District Court, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in

error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

[139] WITNESS the Hon. GEORGE M. BOURQUIN, United States District Judge for the District of Montana, this 13th day of December, A. D. 1916.

[Seal] GEO. W. SPROULE,
Clerk United States District Court for the District
of Montana.

By Harry H. Walker,
Deputy.

Due personal service of the foregoing Citation made and admitted, and receipt of copy acknowledged, this 13th day of December, A. D. 1916.

WHEELER & GRORUD,
Attorneys for Plaintiff in Said District Court and
Defendant in Error.

[140] [Endorsed]: No. 123. District Court of the United States, for the District of Montana. David Clement, Plaintiff, vs. Chicago, Milwaukee & St. Paul Railway Company, a Corporation, et al., Defendants. Citation of Writ of Error. Filed Dec. 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy.

[141] On December 13, 1916, Praeceptum for Record on Appeal was filed herein, being as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation; CHI-
CAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY, a Corporation; J.
E. WOODS, and M. I. CHAPPELL,

Defendants.

Praeceptum.

The clerk of the said court will please insert the following in the transcript on appeal:

Amended Complaint, Separate Demurrers of the Railway Companies, Chappell and Woods to Amended Complaint, Answer to Amended Complaint, Verdict, Judgment, Petition for New Trial, Bill of Exceptions, Opinion, Remission of Judgment and Order of Court Denying New Trial, Petition for Writ of Error, Order Allowing Writ of Error, Writ of Error, Assignment of Errors, Citation on Writ of Error, Supersedeas Bond on Writ of Error, Bond on Writ of Error, and Praeceptum.

GEORGE F. SHELTON,

FRED J. FURMAN,

A. J. VERHEYEN,

Attorneys for Defendants, Plaintiffs in Error.

[142] Service of the above and foregoing Praecipe is hereby acknowledged and copy thereof received, this —— day of December, 1916.

Attorney for Plaintiff.

[143] [Endorsed]: No. 123. In the District Court of the United States for the District of Montana. David Clement, Plaintiff, vs. Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Chicago, Milwaukee & Puget Sound Railway Company, a Corporation, J. E. Woods and M. I. Chappell, Defendants. Praecipe. Filed Dec. 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy.

[144] **Clerk's Certificate to Transcript of Record.**
United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 144 pages, numbered consecutively from 1 to 144, inclusive, is a true and correct transcript of the pleadings, orders, judgment, opinion of the Court, and all other proceedings in said cause required to be incorporated in the record on appeal therein by the praecipe of the appellant for said record on appeal, including said praecipe, and of the whole thereof, as appears from the original records and files of said court in my possession as such clerk; and I do further certify

and return that I have annexed to said transcript and included within said pages the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of fifty and 20/100 dollars, and have been paid by the appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 23d day of December, 1916.

[Seal] GEO. W. SPROULE,
Clerk United States District Court, District of Mon-
tana.

[Endorsed]: No. 2900. United States Circuit Court of Appeals for the Ninth Circuit. Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Chicago, Milwaukee & Puget Sound Railway Company, a Corporation, J. E. Woods and M. J. Chappell, Plaintiffs in Error, vs. David Clement, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed December 26, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.